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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

October Term, 1940

No. 331

Petition For Certiorari

GEORGE S. HOUSTON and HARGIS LANGDON, Trustees, Morris Wholesale Liquor Distributing Company, Inc., by HARVEY H. SMITH, Attorney in Fact, and HARVEY H. SMITH, in His Own Behalf.

Petitioners

vs

THE HONORABLE MAC SWINFORD, Judge of the United States District Court for the Eastern District of Kentucky, and the CIRCUIT COURT OF APPEALS for the Sixth Circuit, Hon. Xen Hicks, presiding Justice and J. W. Martin, et al.

Respondents

Petition for Certiorari of Morris Wholesale Liquor Distributing Co., Inc., by Harvey H. Smith, Attorney in fact, and George S. Houston and Hargis Langdon.

HARVEY H. SMITH,
1108 Fourth National Bank Bldg., Cincinnati, Ohio
Covington, Ky.

Attorney for Petitioners

(Guarantees violated, 5th, 7th, 14th Amendments, and Art I, Section 8, Constitution of the United States'.

POINTS — INDEX — SUMMARY

Statement of issue, 1-2 Paragraphs.

Court of Appeals Sixth Circuit refused to write findings; Paragraph 3.

Denied and remedy, paragraph 4.

Order dismissing Counter Claim made in Cynthiana, not a court place—violated rules when filed as court order. Paragraphs 4 and 5.

Judge refused to make findings or state of record, courts position 6-7.

Real cause of action—Paragraph 9-10, Jurisdictional liability, limitation against revivorship, none attempted, all orders thereafter void. Paragraph 10, sub. a, b.

Sub. Par. c—Statement of attachment action, void, not served as issued, not served by sheriff to whom issued.

Attachment for consumers taxes, import taxes in violation of sec. 8 Art I Constitution U. S. Par. 10, sub. c.

James W. Martin, Ex Rel. plaintiff in default for more than 6 months in pleading, Rule 60. No relief by court after six months; no action to vacate any order after 12 months, (except by appeal).

Default from May 1st, 1938 continuously without leave of court, but allowed to take judgment April 29, 1940, over objection of Defendant. Par. 10 sub. d. Rules ignored by Judge.

Par e. of 10—No revivorship after plaintiff Martin resigned, July 1939.

No judgment could be taken (Sixth Circuit), Court of Appeals of Kentucky, Kentucky Statute, section 999-US rule 25.

Motion of defendant for judgment January, 39 should have been sustained.

No revivorship after 12 months under Kentucky statute, none under US Rules after 6 months—judgments after that time void. Denied equal protection because there is no right of appeal to show misconduct and predjudice of the court by review. Appeal denied by both District and Appellate Court for Sixth Circuit. Par. sub. F.

Motion to Vacate findings (supposed), opinion in fact, Nov. 6th, 1939, after Martin's resignation as Internal Commissioner must be sustained as matter of right under Kentucky Code and Statute as well as US Rule 25 and USCA Statute section 780. Pages 8 to 12.

24th day of November, 1939, Pro Confesso judgment must be sustained, undenied—action was as matter of law proceeding exparte, tho the record shows that Answer and Counter Claim was filed Dec. 11, 1939, and unanswered or replied to. Sub. Par. 8-10.

No Penal attachment can be served in Kentucky out of the county where offense committed—this attachment void. Par. g. of 10.

Motion filed by an officer to dismiss without authority or right under Kentucky or Federal law. Judge refused to swear witness or receive any evidence from the Defendant or require notice of such action—Equal protection denied. Oliver case 156—Ky. 646.

Court refused to swear witness, but heard his testimony in the form of a written communication by motion, without attorney and without making said Morris a party to the action. Par. h, from pages 15 to 19.

Both respondent courts refused to make findings on demand of defendant. Pages 15-16, sub. h and I.

Judge refused allowance of motion for actual parties to litigate after Ed Morris had departed from the litigation in violation of fixed, positive rules of the Federal and State Courts.

Unrevocable power of attorney held by Harvey H. Smith from Morris Wholesale Liquor Distributing Company to carry out contract with Langdon and Houston as TRUSTEES. No Judgment can be taken in Kentucky without service or appearance of trustees, who appeared by petition. Pages 19-22 and par. 10, sub. J. K. I.

H. Clyde Reeves, without making him a party to the action, allowed by court to take judgment, without a hearing—all in defiance of the Code of Kentucky and US Rules, pages 19 to 22. Par. I. to M.

Orders made at Cynthiana, not a place to hold court, at suggestion of Counsel who had, under the law been expunged from the record; and at their suggestion without a hearing in open court. They had procured the said Morris to dismiss, without settlement of counsel fees, and in violation of contract with Houston and Langdon and other suitors for taxes.

The hearing required by law was denied page 23, Par. M.

Six months and one year default in pleading and default in revivorship, left the proceeding one on the cross petition. Denial of trial by JURY. Pages 23, 24, 25 and paragraph sub. M.

Houston and Langdon known real parties by court who refused filing of motion for order to make them parties in order that they could prosecute suit and secure relief for all parties, return of money had and received by the state. Pages 22 to 28.

Collection of money for taxes was under a void act since repealed, and repealed when Taxes were demanded made penalties void. Pages 28 to 30—attachment void. must be served as provided by the Code. Section 25 provides a judgment under the record here, is void. See page 29.

Judgment of settlement April 29th void—had no legal parties on either side, only such disbarred parties, who existed only in the imagination of the Respondent, Hon. Mac Swinford. Judgment of dismissal, void, of March 4th, 1940. Pages 29-30.

When an order of dismissal is proposed, the right of hearing is a constitutional right under the Constitutions of Kentucky and the United States. Page 30, denied by Judge.

Opinion of the Court that Corporation was "dissolved," then calling for evidence violated Kentucky and Federal rules, and law. No evidence can be received after judgment. Right to cross examine a witness is a constitutional right secured by Federal and State Constitutions—Denied to Harvey H. Smith by Judge. Pages 30, 31 and 32.

Neither Ed Morris or Morris Wholesale Liquor Distributing Company had any right or title in the actual res litigated under the assignment of May 15th, 1938, and the Judge knew this, but refused to allow Houston and Langdon to be made parties or to allow Harvey H. Smith to present their rights at a hearing. or file petition and have summons. Page 33, paragraph 34-35.

Tax act provided, and license Act and general statute, that Auditor must bring the action, not a party here—section 10 of the Act of 1934.

Agreement of settlement between parties who did not exist on the record, April 29, 1940, absolutely void.

Judgment entered that day void under Kentucky law. Page 37. Par. sub. v. pages 37-38 import taxes illegal under Kentucky decisions, and prohibited by sec. 3 Constitution of Kentucky.

Judge refused to allow petition filed and summons served as provided by section 25 of Kentucky Code, and they had and were collecting, (these men,) not parties to the suit, double taxes, suing for when refused, disallowed imports, unless tax paid in advance, then remaining in cause of action to defeat collection by assistance of respondent judge in this cause whose orders were orbitrary. Pages 38-39 decision of Court 302 US, 583.

Sub. w. 39—applied to Circuit Court of Appeals (respondent) who refused any relief by mandamus—requested findings which were denied. Page 39-40. Imposed Statute unconstitutional.

Without relief. Filing of petition moved for, required and allowed by Kentucky Code, section 502—"the order shall be served as a summons." The judge denied both petition and motion—the Sixth Circuit refused to give relief. Page 40.

Kentucky Code provides, if action is not revived motion to strike will be sustained—Judge denied filing of Motion to strike when presented or at all, after he had rendered JUDGMENT (Page 41).

April 29th to make appearance look right on the record a lawyer by name of Chapman was brought in when judgment against Morris was agreed or the corporation over which they had no control. Corporation could not sue. Page 43.

The Judge participated in all of these inlawful acts, denied a proper hearing whereby he knew from pleadings filed they would be exposed, and without making an order expelling Harvey H. Smith from the case referred to him in all cases as being no longer counsel, and this without a hearing. Page 44. Mandamus lies to order expelling counsel 4.

The order made by Judge at Cynthiana which he thought expunged Harvey H. Smith from the case recites both Martin and Reeves as parties, and the Order of April 29, recites a pred-

judicial order against all claims against the state in the name of the Morris Company, showing the ultimate purpose of all participants to judicate the claims without a legal hearing. Pages 45-46. Showing there the mistrust of Harvey H. Smith by the filing of a motion to dismiss to the court and clerk. Pages 46-47 Shows how H. Clyde Reeves was wormed into the case as plaintiff, without any hearing or any order, they believing if they could get Chapman in the case they could avoid passing on this question after they believed they had ousted Harvey H. Smith from the case.

47-48-49 shows Clifford Smith was never legally employed to represent the commonwealth and never at anytime had a right to appear.

The action below was ignored, without relief by the Sixth Circuit Court of Appeals' action in denying Mandamus, the only remedy available to defendants.

Violation of the laws of Kentucky for the protection of litigants, and the decisions of its highest court interpreting said laws. Therefore denial of equal protection of the laws and due process—14th Amendment to the Constitution of the United States Pages 48-49.

Exhibits begin at page 50.

Supreme Court of the United States

No. ————————

October Term, 1940

Petition For Certiorari

GEORGE S. HOUSTON and HARGIS LANGDON, TRUSTEES, MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC., by HARVEY H. SMITH, ATTORNEY IN FACT, and HARVEY H. SMITH. IN HIS OWN PROPER PERSON,

Petitioners

vs.

THE HONORABLE MAC SWINFORD, JUDGE of the United States District Court for the Eastern District of Kentucky, and the CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, HON. XEN HICKS, PRESIDING JUSTICE, J. W. MARTIN, et al,

Respondents

PETITION FOR CERTIORARI FOR MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC., BY HARVEY H. SMITH, ATTORNEY IN FACT, AND GEORGE S. HOUSTON AND HARGIS LANGDON.

In the cause of: J. W. MARTIN, et al, vs. MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., Inc. (Judgments void—No Appeal.)

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners in this behalf allege and complain:

1. That on or about the 4th day of March 1940, the Honorable Respondent, Mac Swinford, the regular Judge of the United States District Court for the Eastern District of Kentucky, sitting in the trial of this cause, then pending in said district, entered an order in Cynthiana, Kentucky, not a place designated to hold court, dismissing the counter-claim and cross-petition herein filed, with petitioners answer, in this cause, over the objection of its regular attorney, Harvey H. Smith, and who had not been deposed as such attorney, and who held a power of attorney in addition to his regular employment to do and perform certain things, which by agreement Morris Wholesale Liquor Distributing Co., Inc., agreed to, and the order of the respondent, Mac Swinford, was made in said court without notice to the said Harvey H. Smith, or said corporation, and without a proper hearing, as provided.

Illegal motion made by Ed. Morris — That thereafter your petitioners applied to the said United States District Court and demanded a full hearing according to law, and the opportunity of introducing testimony so as to determine the said motion made by Edward Morris, a stockholder and officer in said corporation, about which matters the court was entirely without jurisdiction. That at a later time, on or about the 29th day of April, 1940, the said court entered an order in said case, settling the issues and controversies therein, as he supposed, and against the interests of your petitioners, without a hearing, as the judge of said court, it being contended by the court at said time that Edward Morris had the right to make a motion to discharge the corporation attorney and dismiss said cross-petition, outside of the manner provided by law, and without factual or legal authority so to do, Kentucky law nullifying such motion as made.

(NOTE: Words in parenthesis are counsels — Exhibits are made part of petition by rules of this court).

2. Thereafter, your petitioners filed their application in the Circuit Court of Appeals for the Sixth Circuit, praying said court that a mandamus be issued to the said Honorable Mac Swinford, directing him, as the presiding Judge of said court, to enter an order revoking said order of dismissal and to grant the *motion* of your petitioners to make all the parties to the agreement, hereinafter alleged, parties plaintiff with the Morris Wholesale Liquor Distributing Co., Inc. That thereafter, the said Mac Swinford, Judge of said court, refused or failed, your petitioners are not able to determine which, to permit the filing of a notice of appeal to the United States Circuit Court of Appeals for the Sixth Circuit, which notice of appeal is legally necessary, and at the same time, they prayed the allowance of an appeal to said court from said order of March 4th, entered prior thereto, the said Respondent Mac Swinford refusing to allow said appeal because Harvey H. Smith was not attorney. That thereupon, your petitioners prayed the Honorable Circuit Court of Appeals for the Sixth Circuit to enter an order allowing mandamus against orders of the said Honorable Mac Swinford, as Judge of said court, and as the court, some of which orders were void, because not made by the court, but were made outside of the court, never entered by the Court, but at Cynthiana.

3. That the final order of the Judge, which was entered on March 4th, was entered without notice to Harvey H. Smith, attorney for Morris Wholesale Liquor Distributing Co., Inc., and the said Honorable

Mac Swinford affirmed the agreement entered into between Edward Morris and James W. Martin and H. Clyde Reeves, the said Martin being the resigned officer, as Internal Revenue Commissioner of Kentucky, which resignation took effect from the 1st day of July, 1939. The said H. Clyde Reeves was his successor in office, but had never qualified as by law provided, as his successor as revived plaintiff on his relation as such officer to the Commonwealth of Kentucky in this cause; and at all times there was no plaintiff thereafter. Nor had the court jurisdiction because the Franklin Circuit Court had none, prior.

4. That the Honorable Circuit Court of Appeals refused to make any findings in the cause although motion was filed in the application for mandamus, and the motion to allow an appeal was refused by the said District Court, with no reasons or no findings in the case. That your petitioners therefore have no adequate remedy as they understand the rules of this court except to apply to the Supreme Court of the United States with directions through and by a writ of certiorari to the Sixth Circuit Court of Appeals in the first instance, to make findings or to adopt the findings from your petitioners or refuse to make such findings by proper orders of the court, and to make a finding in respect to their said refusal to grant your petitioners an appeal from the said orders of the said Honorable Mac Swinford. That the order of March 4, 1940, made by the said Honorable Mac Swinford, in the opinion of your petitioners, was not a final order such as they might appeal from, and the order made on March 4th, 1940, settling said

cause of action involving more than $100,000, and which was made *without the consent of your petitioners,* without their knowledge, and without any authority upon the part of the Morris Wholesale Liquor Distributing Co., Inc., by Ed Morris and without any jurisdiction in said court to affirm or adopt said agreement as a judgment of the court.

5. That the order of the court, made in Cynthiane on March 4, 1940, is attached to this petition and made a part hereof, as Exhibit A, Sub. Y. and the said decree and order made on the 4th day of March, by the Honorable Mac Swinford, is a void order under the Code of Kentucky and the Court rules of the United States, and under the pleadings in this cause, but that the said District Court, presided over by the Honorable Mac Swinford, has not up to this time allowed an appeal from said order or allowed Harvey H. Smith and your petitioners to take exceptions to the same, it being a final order as to them, and has refused to sustain their motion for bill of exceptions in said cause, in order that your petitioners might show and prove to the Honorable Appellate Court that these orders that have been entered by the Honorable Mac Swinford and the pleadings filed, as a matter of law, by your petitioners, which were refused on the order of the said Honorable Mac Swinford, could not therefore be made a part of the record in this cause.

6. That the Honorable Mac Swinford, the Presiding District Judge, has heretofore refused to make any findings in this cause of action or to sustain a motion for findings made by the Morris Whole-

sale Liquor Distributing Co., Inc., by and through Harvey H. Smith, its regular attorney.

7. That the Power of Attorney given to Harvey H. Smith by the Morris Wholesale Liquor Distributing Co., Inc., was executed to and for your petitioners and Harvey H. Smith, it being represented at said time the Morris Wholesale Liquor Distributing Co., Inc., had complied with all of the laws of the State of Kentucky and could qualify in any action for or against itself, as such corporation, but that this fact was known to the officials of the State of Kentucky who represented the Internal Revenue Commissioner, the said H. Clyde Reeves, and the said James W. Martin, and the same was known by the said Edward Morris. That said Power of Attorney, as executed under the laws of Kentucky, is a valid and subsisting agreement, cannot be revoked except by a due process of law hearing. That no action has ever been brought to cancel said power of attorney for which it was executed and made, because the said corporation had no power to bring an action in the State of Kentucky, over objection nor defend an action in the State of Kentucky, but its contracts were valid, and said Respondent and said Morris knew this fact.

8. That on or about the 14th day of February, 1940 your petitioners ordered a motion to be presented to the Honorable District Court, asking for leave to file their petition, according to the Code of Kentucky, Sections 24 to 28 (Carroll's), whereby they would be made parties to the action and prosecute said action in the United States District Court, according to the rules controlling and governing said

court at said time. That this motion was never acted upon, nor denied until the said United States District Court, by the Honorable Mac Swinford, had rendered an order, more than one month thereafter, on March 4, 1940, dismissing the said counter claim cause of action. The said court, at said time, then refused (March 13, 1940) to consider said motion to make your petitioners parties to the action because the Judge had, prior to that time, entered an order dismissing said cause of action. This order of the Judge is made a part of this petition, denominated Exhibit C, and which motion, Exhibit B, at said time was attached to the motion to strike, and the said motion was presented to the Clerk of said court Feb. 14, 1940. That the exhibits herein referred to, from A to Y, are made a part of the petition and are referred to in order to complete the allegations of facts necessary to present to this Honorable Court their petition for a writ of Certiorari.

THE REAL CAUSE OF ACTION

9. That the real cause of action arises by an attachment suit brought by James W. Martin, then Internal Revenue Commissioner of Kentucky, against said corporation in the Franklin Circuit Court, sitting in Franklin County, Kentucky, a special court wholly without jurisdiction in this cause, decided by its highest court. That thereafter, under a void writ of attachment, 225 cases of liquors, then in the possession of the Morris Wholesale Liquor Distributing Co., Inc., were seized at Catlettsburg, Kentucky, by the Sheriff of Boyd County, a county other than Franklin County, where the Franklin Circuit Court

sits, which court had no jurisdiction to issue attachment for penalties under a criminal statute, but only to issue attachments under a civil statute, as provided by the Constitution of the State of Kentucky and the laws thereof; and an additional sixty cases, all of the value of $3000, at $10 per case. That the said Edward Morris, as Secretary of the said Morris Wholesale Liquor Distributing Co., Inc., was indicted in the criminal action in Boyd County, and injunction was refused by the Circuit Court of Boyd County, directed against James W. Martin, et al. In these actions, Harvey H. Smith acted as attorney for the said Edward Morris and the Morris Wholesale Liquor Distributing Co., Inc., and that an action also was filed on or about the 25th day of March, 1938, before the said James W. Martin and the Kentucky Beverage Liquor Control Board to cancel the said license of the said Morris Wholesale Liquor Distributing Co., Inc., to engage in and to do business in Kentucky, as a wholesaler of liquors. That Harvey H. Smith appeared and defended this action, and thereby prevented cancellation of the said license, which by law expired on the 1st day of July, 1938, and since that time has not been renewed.

10. That the following steps in this case have been taken, and the following facts are alleged as a part of this petition:—Jurisdictional and liability grounds.

(a) Action as to plaintiffs abated July 1, 1939, by operation of law under Kentucky decisions, which under the decision of the United States Supreme Court in Erie Railroad vs. Thompson are controlling here, provided such regulations are not inconsistent

with the rules of the United States Supreme Court, which rule 25 of the said Supreme Court rules and U. S. C. A. statute 780, are consistent with the said laws of Kentucky, except time of revivorship, which said rules of the said Supreme Court of the United States control as to time. (Carroll's Code). 501

(b) Petitioners allege no substitution was made within six months, as required by the Federal Statute, U. S. C. A., section 780, and rule 25, wherein it is provided that notice of revivorship shall be served, as under rules 4 and 5, and under the Kentucky Code, said notice shall be served and *time given of ten days for hearing,* and the final determination of said court must be recorded as a part of the minutes of said court in the docket of said court, and when said notice has been given and served of the hearing on said motion, which motion shall be based upon the application to make said parties a part of the cause of action a summons being required to be issued on said petition, and motion served to the responsible parties in the action, who were the said previous attorneys of James W. Martin and the Commonwealth of Kentucky, J. J. Leary and Sam Rosenstein, and the Attorney General, all necessary parties under the Kentucky Code to obtain jusridiction on said petition of intervention, but no service could be had until said petition was allowed—filed as a matter of right.

(c) That the original attachment was issued and served on or about the 24th day of March, 1938, on the Morris Wholesale Liquor Distributing Co., Inc., That the sixty cases of liquor referred to herein were seized by an officer without a search warrant, and while loaded for transportation to the City of

Cincinnati, in interstate commerce, being returned to the wholesale company from which they were purchased. That the said Edward Morris was indicted in the Boyd Circuit Court for possessing and transporting liquor without placing tax stamps thereon. That this question to determine whether the tax was valid or not was involved in this transaction. That the Commonwealth of Kentucky and James W. Martin claimed at said time that a sum of $10,000 was due and unpaid by the Morris Wholesale Liquor Distributing Co., Inc., for liquor sold in violation of the Act of 1936, and the Act of 1934. That the obligation arose as a licensee, if any existed, because the said Morris Wholesale Liquor Distributing Co., Inc., did not pay said import and consumers' taxes. That an audit had been agreed upon to determine whether such taxes were due and unpaid, and was made, of the books of the Morris Wholesale Liquor Distributing Co., Inc., and it was determined by said audit that approximately $350 was due to the Commonwealth of Kentucky and James W. Martin; if said tax statute which authorized the levy of said taxes was a valid and binding statute. That the action against Edward Morris, as Secretary and Treasurer of said corporation, was dismissed in the criminal division of the Boyd Circuit Court. That the said Harvey H. Smith appeared at said time as his attorney and answered in the criminal division of said above cause, sued out an injunction against the said James W. Martin, and appeared in said civil action in the Franklin Circuit Court to dismiss the said petition on the grounds said court had no jurisdiction of said cause; and furthermore, that the taxes attempted to be collected were invalid. That on or about the

15th day of May, 1938, an action was brought before the Kentucky Beverage Liquor Control Board, which action, among other things, charged the said Morris Wholesale Liquor Distributing Co., Inc., of selling liquor without tax being paid by it in the sum of $10,000. At this time an agreement was made to audit the books of the said corporation. This attempted cancellation of the license of the Morris Wholesale Liquor Distributing Co., Inc., failed — the said Harvey H. Smith appearing as counsel for said corporation, not for Edward Morris.

(d) That from and after the 1st day of May, 1938, the plaintiffs, James W. Martin, and the Commonwealth of Kentucky, in the said attachment action, were in default in the United States District Court for the Eastern District of Kentucky. That this default will be shown to this Honorable Court by Exhibit D, which is attached as a part of this petition, showing that the Honorable Respondent, Mac Swinford, ignored the rules of the Supreme Court of the United States controlling Civil actions in the United States District Court for the Eastern District of Kentucky.

(e) That on or about the 1st day of July, 1939, James W. Martin, as Revenue Commissioner for the State of Kentucky, separated himself from that office and was succeeded in office at that time by H. Clyde Reeves, who exercised said functions of said office at all the times hereinafter alleged. (Ky. Statutes, Section 999). U S C A 780.

(f) That on or about the 25th day of January, 1939, the defendant, Morris Wholesale Liquor Distributing Co., Inc., made a motion for judgment on the pleadings and to dismiss plaintiffs action before the Honorable United States District Court, and the said, the Honorable Mac Swinford. At the time this motion was made, no effort had been made to secure leave of court for the filing of any pleading on behalf of the plaintiffs, in addition to their said petition, and no response had been made to the motion of the defendants to vacate the opinion of the Judge, which was, the motion to dismiss, and for judgment, January 15, 1939, not a valid motion as a matter of law or fact, though the court being apprised of the fact that the said James W. Martin had not filed any pleading *within six months* prior to that time as provided by the rules of the Supreme Court, a default that could not be cured by leave of court, but the court and counsel completely ignored the rights of defendants, apparently acting in unison all of the time, at least against the rights of the defendant, as it appeared, totally indifferent at all times to the constitutional right of an impartial hearing.

Nor had the rights of Martin's successor in office as a proper reviving officer after the first day of July, 1939, been even suggested, which revivorship is required by both the laws of Kentucky and the laws of the United States, 780 USCA and rule 25 of the Supreme Sourt Rules in order to retain jurisdiction. (249 Ky. 498).

A motion to vacate the opinion of the Judge, far afield of the issues, rendered November 6, 1939,

was filed by defendants and denied on said date — the Court or the Respondent totally ignoring the rules controlling on the court. That Martin's default as plaintiff continued until the time expired to present a revival of the party-plaintiff, after six months. Rule 60 (b)—No pleading thereafter, default must be sustained.

(g) That on or about the 24th day of November, 1939, the defendant, Morris Wholesale Liquor Distributing Co., Inc., acting by Harvey H. Smith, and acting under his power of attorney for the Morris Wholesale Liquor Distributing Co., Inc., and the power of all claimants then in his hands, mailed a motion for a pro-confesso judgment and an answer and counter-claim as required and permitted under the laws of the United States to said Court. (Rule 60).

The record shows that the Answer and Counter Claim was filed of the date of December 11, 1939, with motion for allowance of filing, but the motion for pro-confesso judgment shows a filing record date of February 9, 1940, when it should show a date of January 21, 1940, as plaintiffs had then been in default of pleading. No reply to said motion or responsive pleading was ever filed by plaintiffs, who were, under the rules of the Supreme Court, and under the Code of Kentucky, and under its decisions, *out of the case*, and the action was proceeding ex parte on the counter-claim of defendants. That on February 9, 1940, Motion for Summary Judgment, by defendant, was filed but not shown of record, and said date of pro-confesso motion is not shown, but filed January 21, 1940; and plaintiffs, still in de-

fault of a pleading or a party plaintiff, therefore, again, defendants filed their motion to dismiss plaintiffs entirely from the cause, and abate their cause of action *in attachment.* On this date Edward Morris appeared in person and moved to dismiss Counterclaim of defendants, when all authority to act in this respect or at all, was out of the power of the said corporation under the power of attorney executed to Harvey H. Smith, and under the contract executed by The Morris Wholesale Liquor Distributing Co., Inc., with other claimants.

This was a simple motion to dismiss, signed by Morris, who was not the Morris Wholesale Liquor Distributing Co., Inc., nor did his motion assert it was for the corporation, but for himself.

Harvey H. Smith then demanded in open court that Morris be sworn, and that he have a right to cross-examine him and show the cause of his attempted action, which was to perpetrate a fraud on the court, and his associates in the litigation, but the court refused to swear him, a denial of due process; and thereafter made entry of an *order out of court,* sustaining said motion, in face of the demand of Harvey H. Smith for a hearing, and after actually refusing the motion for parties and refusing to pass on defendants' motion, filed February 9, to dismiss Plaintiffs entirely from the case. All of this evidence under Kentucky law is incompetent.

That Edward Morris and the pretended counsel of James W. Martin, then a stranger to the record and the said H. Clyde Reeves, who was not a party to the action, knew that a cross-examination of the

said Morris would expose the deal made with him to dismiss these claims, they knowing full well that no court, with knowledge, would permit such a fraud being perpetrated in a court of justice of the United States.

It was the law of Kentucky and the law of the United States at the time, of the district court, the court of first instance, was asked to make findings of fact separate from conclusions of law, and refused, and the Circuit Court was asked by a motion for findings to base its decisions upon such findings so as to advise the Supreme Court of the United States. *Neither of these courts made such findings.* The law of Kentucky is the same as the rules of the Supreme Court of the United States, and your petitioners allege that, both of respective respondents, who refused to make such findings denied to your petitioners due process of law, and allege that in a proceeding of equity, accepting the United States District Court's opinion of the character of the case heard by him, that court was equally in error in refusing to make findings: Amendments 5-14 on law issues. (U. S. A.) 686.

We quote rule 70½, which existed prior to the present rules and which is the law of Kentucky: (Quoted in Substance):

> "In deciding suits in equity, including those required to be heard before three judges, the court of first instance SHALL find the facts specially and state separately its conclusions of law thereon; and in granting or refusing injunctions, the court of first instance shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its acts. Such findings and conclusions shall be entered

of record, and if an appeal is taken from the decree, shall be included by the Clerk in the record, which is certified to the appellate court under Rule 75 and 76."

A portion of this rule was added by the amendment of November 25, 1935, which is now rule 52 of the Supreme Court rules. The court also decided under rule 52 (Silverking vs. Silverking, 204 Fed. 166, and 229 U. S. 624) the following: (Quoted in substance). Applied to facts.

"The rule is applicable to all classes of findings in cases tried without a jury, whether the finding is of a fact concerning which there was conflict of testimony or a fact inferred. The rule applies also to make findings and conclusions of law. These rules have the force and effect of law, so that neither the District Court nor the Appellate Court could adopt a practice inconsistent with it. These findings of fact in actions at law had to be ultimate facts. The actual upstanding law was to be the basis of the conclusions of law. It was necessary to make the opinion of the court and the findings of the court or the refusal of the court to make findings a part of the record, which your petitioners endeavored to do in filing a motion for bill of exceptions which was declined by the court. The opinion of the court is insufficient because it does not constitute the grounds of decision, and if there is any evidence introduced it is necessary for the court to make findings of fact. If the District Court fails to make such findings, the Circuit Court of Appeals may order said finding to be made in order that such findings may aid this court in the consideration of the case. The defeated party will be unable to determine whether the case presents a question worthy of consideration by the appellate court if such findings are not made."

In Interstate Circuit vs. United States, 304 U. S. 55, the Supreme Court of the United States criticised the District Court by saying: (Quoted in substance)

> "The district court did not comply with this rule. The court made no findings and did not state separately his conclusions of law the rule required. The opinion of the court was not a substitute for the required findings and it did not constitute the special and formal findings by which the issues were to be determined by the court; and in refusing interlocutory injunctions, the court shall similarly set forth its findings of fact and conclusions of law which constitute the grounds of its action."

Your petitioners allege that the Circuit Court of Appeals for the Sixth Circuit, on the application for mandamus, refused to consider findings and conclusions of law, and the United States District Court for the Eastern District of Kentucky also refused to make findings, or adopt any portion or reject any portion of the findings moved by your petitioners, and the Morris Wholesale Liquor Distributing Co., Inc., Defendants believe, on sound information, that all arrangements were made with said Ed Morris to dismiss after a legislative deal had been completed, in which one J. W. Chapman became a party, then a member of the Legislature, in charge of a monopoly measure, by which Morris would acquire by license from H. Clyde Reeves the right to export liquor under the terms of a bill then in the Legislature pending.

(h) That an attachment cannot be run or sued out in Kentucky in the Franklin Circuit Court, until there is issued a summons from a court where

jurisdiction is granted as a matter of law. That said attachment was void. That the said cross-petition of the Morris Wholesale Liquor Distributing Co., Inc., was set up on the basis of an agreement entered into on May 15, 1938, between a number of claimants who had paid import taxes in violation of the Constitution of Kentucky, Section 3, Bill of Rights, and of Article 1, Section 8, of the Constitution of the United States, and in violation of sections 171, 172, and 174 of the Constitution of Kentucky. That under the Act of 1934 and under the Act of 1936, and as a matter of law, under the decisions of the Court of Appeals of Kentucky, a suit may be brought by counter-claimant to recover unlawful taxes as a matter of right, one for all.

(i) This agreement provided, among other things, that the Covington Liquor Co., Inc., Blue Grass Liquor Co., and some six other corporations and individuals who had paid illegal taxes to the Commonwealth of Kentucky were to be joined in an agreed action to secure the relief demanded for money had and received in the hands of the Commonwealth of Kentucky and its said Internal Revenue Commissioner. This cross-petition was in the nature of a set-off and counter-claim, which under the laws of Kentucky may be brought to recover said taxes amounting in all, at said time, to more than $100,000; for disclosed and undisclosed parties.

(j) That the Morris Wholesale Liquor Distributing Co., Inc., executed a power of attorney to Harvey H. Smith to act in all respects, and have control of this litigation, and to defend and prosecute the claim of all other persons in Kentucky, who

belonged to this class, and who were interested in the funds then in the hands of the Treasurer of the State of Kentucky that had been unlawfully paid, including both consumers' and import taxes of various and divers persons, which power or contract could not be abrogated by any one party.

(k) That the proportions included in this suit were of such an amount that the said James W. Martin and the said H. Clyde Reeves and his attorneys were interested, being in default, both in pleading, and not providing revivorship to continue said action, and knowing that a motion for judgment must be entered for the defendants on the said claims for taxes, entered into a bargain with the said Edward Morris to provide him with a permit to export liquor from the State of Kentucky under a bill that was to be passed by the Legislature, dividing up the State of Kentucky and the said districts, which districts were to be within the control and discretion of the said H. Clyde Reeves, and said Bill was passed through the Legislature through the influence of one J. W. Chapman, who was a member thereof, and for which bill the said Edward Morris had spent his entire time in lobbying for during the session of the Legislature of Kentucky in 1940, assisting in every way to procure its passage. That said political agreements were made to divide this patronage in business to certain individuals in the State of Kentucky who would receive licenses as your petitioners fully believe.

(l) That in consideration of the reward to the said Edward Morris, he was to appear in the United States District Court for the Eastern District of

Kentucky and personally, himself, without counsel, make a motion to dismiss the cross-petition filed by your petitioners and the said Harvey H. Smith; your petitioners having entered into a written agreement with the Morris Wholesale Liquor Distributing Co., Inc., and having advanced their share of the expense of litigation with the said Morris Wholesale Liquor Distributing Co., Inc., up to said time, and having had at said time a lien for said moneys advanced on the assets of the Morris Wholesale Liquor Distributing Co., Inc., which had been seized by the said James W. Martin and the Commonwealth of Kentucky. That the Honorable Mac Swinford, United State District Court Judge, knew, by pleadings filed in his court, that said charges had been made and that the said Harvey H. Smith, on February 9, 1940, in the court house in the city of Lexington, when the said Edward Morris appeared without service of notice for hearing, demanded that he be sworn, and that the said Harvey H. Smith should have the right to examine him as to the truth of these allegations herein made. That the said Honorable Mac Swinford, then presiding as said District Judge, refused to permit an open hearing or to swear the said Edward Morris. That on the 14th day of February, 1940, following this said hearing in Lexington, a motion to strike and a motion for leave to file a petition setting out the interests of your petitioners in view of Morris' conduct, was presented to the Clerk of said court who admitted that the motion to strike was not filed by him until a later date, and that the petition for making your said petitioners parties was not filed, because motion to strike not allowed, to which was attached the motion for

leave to file, or attached to the said motion to strike, your petitioners are unable to say which. This pleading was presented to the United States District Court in due time and immediately after the alleged hearing on the 9th day of February, 1940, and no filing was made of said motion to strike which raised all of the necessary questions, and which was then in the possession of the Clerk of the United States District Court, and which your petitioners allege and believe was withheld from the record because the Honorable Respondent, Mac Swinford, so directed it to be held, not knowing whether said motion to strike could be filed as a matter of law or not. But before hearing or making entry of said motion to strike, the Honorable Mac Swinford entered a Judge's order at Cynthiana, Kentucky, prepared by J. J. Leary and Sam Rosenstein, attorneys for James W. Martin, a resigned revenue commissioner, and H. Clyde Reeves, which was signed and adopted by the Honorable Mac Swinford, out of the court room in the city of Cynthiana, as your petitioners are informed and allege. That at all the times when this matter was presented to the court, the Honorable Mac Swinford showed hostility towards Harvey H. Smith, your petitioners' counsel in this case, by statements and by refusal to give a fair and impartial hearing, and allow pleadings filed. That the Honorable District Court knew that under the law of Kentucky Ed Morris could not appear for a corporation, and after investigation of this fact he ordered the said corporation which he had found April 1st had been "dissolved," to hold a meeting and pass on a resolution ratifying his decision of March 4th, 1940, over and against the telegraphic demand

for a hearing made by Harvey H. Smith. It being well understood by the said Respondent that the Court of Appeals of Kentucky and the Supreme Court of the United States had decided that no import tax could be levied on merchandise in transit or prior to shipment, and he well knew that the Supervisor of taxes in Kentucky had testified that the tax was levied prior to shipment on whiskey, and that the law provided it should be collected before shipment, and permits to import must be paid before transit; and he well knew that Harvey H. Smith had been employed to collect said taxes by a large number of importers in Kentucky; and the appearing counsel for the said Martin also knew that the effect of a counter claim in this cause would be the collection of a very large sum of said taxes, and tho said counsel had slept on their rights after the resignation of the said Martin, they meant to stay in the cause until they could oust the said Harvey H. Smith, and they sought thereby to defeat this action brought by counter claim, to acquire control of the said Morris, which they did, believing that Morris could dismiss the said counter claim, and thereafter said actions could be defeated under the statute of limitations applying, as they thought, and being not advised as to the contract made with other claimants, the crafty Mr. Ed Morris keeping this secret in his breast. Reading the record will fully inform this court of the Judicial action of said respondent.

Under the laws of Kentucky at said time the Morris Wholesale Liquor Distributing Company had assigned its interest on May 15th, 1938, to your petitioning trustees in order that all claimants would stand on an equal footing, and thereby prevent the

said corporation from doing exactly what it did do. In Kentucky, the said Respondent District Judge well knew that the action could be continued in the name of the Morris Wholesale Liquor Distributing Company, Inc., without the consent of Edward Morris, and that in construing the statute the highest court of Kentucky had construed its provision—"the action may be continued by or against the original party or suitor; and that if motion was presented for filing a petition that allowance of its filing and issuance of summons was a matter of right in the aggrieved party. Said summons may not be issued until a petition is filed." Petition was not allowed.

That the Federal rule is the same, and this fact MAY explain the order of March 4th 1940, without an order dismissing Harvey H. Smith as counsel, which order would have brought a mandamus promptly for a hearing of petitioner's rights and all of the attendant facts. Thus the rights under due process were denied to your petitioners, 5th and 14th amendments. No order has been filed by the court dismissing Harvey H. Smith as attorney.

STATEMENT OF JURISDICTIONAL GROUNDS

(m) That it was the law of Kentucky that said petition to make your petitioners parties *to said action was a matter of right;* and that they were entitled to judgment against the Commonwealth of Kentucky, and James W. Martin, because of the fact that the plaintiffs had not revived their action as provided by law.

The Petitioners allege as specific grounds for jurisdiction:

(1) That parties Plaintiff below were totally in default six months after the month of March, 1938.—Rule 60.

(2) They were in default of revivorship after July 1st, 1939, at all times.—Rule 25, Statute U. S. C. A. 780.

(3) Judgment entered April 29, 1940, is a void judgment for want of parties to the action, plaintiffs having disappeared as parties, and the Court having disallowed cross-petitioners to proceed; dismissing their said petition on the motion of a stranger to the record. The Morris Wholesale Liquor Distributing Co., Inc., could not and did not make a motion of its own authority and power as a corporation, but Ed Morris.

(4) The Court, without jurisdiction, took possession of the assets of $3000 of whiskey and/or liquors and disposed of it by a void order from which no appeal could be taken by petitioners, and having been refused Mandamus by Circuit Court of Appeals, these petitioners have no other remedy except by writ of Certiorari.

(5) The action proceeded ex parte after the six months' litigation statute, federal rule and statute, and the denial of judgment was a denial of due process, and a denial of the administration of the laws of Kentucky and the United States.

(6) The denial of a trial of the issues as made is a denial of the trial by jury under the 7th Amendment to the Constitution of the United States and

Section 7 Bill of Rights of Kentucky and the 5th and 14th Amendments. (U.S.C.) United States Constitution.

(7) The denial of the right to be heard and by due notice to Houston, Langdon, known parties in the proceeding, and a denial of their motion to be made parties, and their constitutional right to have service and summons on their petition, is a denial of protection.—14th and 5th Amendments U. S. Constitution.

(8) A denial of their right to be heard is a denial of their contract with the Morris Wholesale Liquor Distributing Company, Inc., in which they advanced money with no opportunity to be heard in a proceeding in said court on said subject matter of import as well as consumers' taxes, both of which were illegal, collected in violation of law, and in violation of Article 1, section 8, of the Constitution of the United States.

(9) The denial of the filing of pleadings under the rules of law is and was a denial of the equal protection of the laws in this respect and in the above respects, and thereby deprived them of their property without just compensation therefor, and did deny them of their constitutional right to sue on their said contract entered into May 15, 1938, with Morris Co. for a cash consideration already paid, and thus impaired the same, contrary to the Constitution of the United States, 5th and 14th Amendments.

(10) That appellate jurisdiction lies in this court from the Circuit Court of Appeals, and the United States District Court for the Eastern Dis-

trict of Kentucky, and appeal has been denied by said District Court, and Appellate Court has denied Mandamus.

(11) That the action of said District Court in allowing evidence to be introduced by plaintiffs and not by defendants after judgment rendered, March 4, 1940 and April 29, 1940, is a denial of due process and of the 5th and 14th Amendments.

(12) That the action of the court refusing to hear the facts on the motion to dismiss counter-claim and to allow the petition for parties, was a violation of the decisions of the Supreme Court of the United States, as announced in Ex Parte Yerger, 8th Wall. 85—101—103, and an absolute repudiation of Section 7 of the Bill of Rights of the Constitution of Kentucky, and a repudiation of the doctrine of the law as established by the Supreme Court of the United States, in 287 U. S. 94, in the case of Schoenthal vs. Irving Trust Co., whereby it is established that on the question of the trial of money payments which are certain and definite under Section 267 Judicial Code, the trial of these issues under the laws of Kentucky is a matter of constitutional right, and the said Respondent there and then at all times attempted to and did sustain what he considered an equitable practice in the Federal courts—denying a Common law hearing.

(13) Section 267 of the Judicial Code provides that suits in equity shall not be sustained in any court of the United States in any case where there is a plain adequate and complete remedy that may be had at law. 28 U. S. C. A., section 384. And the

said Respondent repudiated the doctrine established in Erie Railroad vs. Thompson, 304 U. S. 64, wherein it is decided on principle that the United States District Court in this cause wholly disregarded the law of Kentucky, which as above recited, controlled its action in respect to the obligation of contract which was entered into between all of the suitors and to be performed within the state by a due process hearing of collecting taxes which were unlawfully seized by James W. Martin, then Internal Revenue Collector; and the Court repudiated section 28 of the Constitution of Kentucky, and the decisions of the courts of Kentucky thereunder wherein it was held that the Legislature has no power by the enactment of the statute, (a statute of March 7, 1938,) to change or affect or modify the rights of litigants in matters then pending in the courts—all tax matters arising under Act of 1934.

(14) That all of the taxes alleged to have accrued to the said James W. Martin, as Internal Revenue Commissioner, and the Commonwealth of Kentucky from the Morris Wholesale Liquor Distributing Co., Inc., accrued before March 7, 1938, under the Act of the Legislature of 1934, known as the Kentucky Alcohol Control Act. That when said Act was repealed on March 7, all litigation then pending under a statute that provided penalties, automatically ceased to exist; and that the effect of the decision of this court to deny these facts pleaded and tried according to the laws of Kentucky was a denial of due process, the said court knowing that these parties to this agreement of May 15, 1938, could proceed for all of the parties in Kentucky who had paid unlawful import taxes and unlawful consumers'

taxes into a common fund then in the hands of the State of Kentucky; and that the determination of this right was to be proven by facts; and under Section 7 of the Bill of Rights of the Constitution of Kentucky, they were entitled to trial by jury; the controlling law at said time that must be applied under the decisions of the Supreme Court of the United States, in Erie Railroad Co. vs. Thompson, Supra, was totally ignored by the court. Section 24 of the Code of Kentucky provides that parties who are united in interest *must* be joined as plaintiffs or defendants, and a jury is guaranteed by 7 of its Bill of Rights and U. S. Constitution, Amendment 7.

(15) Your petitioners allege that under the laws of Kentucky where said contract to collect the said funds, held by the Commonwealth of Kentucky, as between the claimants, for relief, was one action, where one individual might sue for all, and that no valid judgment could be rendered where it was brought to the attention of the court that actual parties existed but were not parties to the suit in case of breach of one party, the suitor.

(16) That it was the law of Kentucky, that where a fund is in the hands of the State or a court, the court must try the title of ownership of said fund to a jury, and the officer seizing the fund claimed, must make his answer to the court to show what authority he has at said time to attach or claim interest in said property.

(17) That under the law of Kentucky, no such attachment as here can be sustained, and in view of the fact that your petitioners, through Morris Whole-

sale Liquor Distributing Co., Inc., made a motion to make the auditor a necessary party to this action, whose duty it is to make investigations under the law to determine whether claims are just or unjust was complete evidence that the auditor had not given his consent to said suit: and judgment of the court on the 29th day of April, 1940, disposing of the liquors seized at said time is a void judgment for want of his consent. Act of 34, Sec. 10. Stat. Ky. 112-5.

(18) That the filing of a petition to substitute parties is a matter of right under the laws of Kentucky, and this right to establish petitioner's right and title to the property is a constitutional right secured by Sections 20, 21 and 22 and other provisions of the Code. (Carroll's)

(19) And furthermore, it is the Law of Kentucky:

(Quoted in Substance)

> "If the right of the plaintiff is assigned during the pendency of the action, it may be continued in his name; or the court may allow the person to whom the transfer or assignment is made to be substituted in the action."

Section Code (Ky.) 25

> "If the transfer of a right to chose in action is made during the pendency of an action after notice of transfer or claim of any rightful party, and any settlement is made between the litigant party and the adverse actual parties, a judgment of the court upon such an agreement is void."

That in said judgment of April 29, the actual parties and the Attorney of record were neither notified, nor had they agreed to such judgment, and that

the right of trial by jury on all the issues of fact precipitated by petitioners application to file an intervening petition, so that they might be made parties in the suit to defend the respective interests of all the parties in the contract of May 15, 1938, being denied by the court, made the judgment of the court void or voidable.

(20) That under the laws of Kentucky the action of the court in rendering judgment on a motion to dismiss on the 4th day of March, 1940, without the consent of Harvey H. Smith, or a proper hearing, and followed by a judgment of April 29, settling the entire controversy, is a denial of due process and contrary to the laws of Kentucky—7 Bill of Rights.

That the Honorable Mac Swinford ignored and refused to consider the fact that the said attorneys and the said James W. Martin had, as a matter of law, decided by the highest court of Kentucky, no right to appear in said action, and were automatically removed from said action as plaintiffs, when they failed, within six months, to revive said action in the name of the successor of James W. Martin.

(n) That thereafter, the said Harvey H. Smith, on March 4th, demanded an open hearing by wire to the Honorable Mac Swinford, who ignored the said wire and entered the order afore-alleged. That this order was entered on March 4th, 1940, but thereafter the said, the Honorable Mac Swinford, refused to petitioners and Harvey H. Smith, a hearing; and in order to sustain his order of March 4th, dismissing your petitioners' counter-claim, he personally, from

the bench, sitting in court at Covington, Kentucky, on April 1st, ordered the said Edward Morris and the said James W. Chapman to present a resolution from said corporation affirming the action of the said Edward Morris, and therefore the action of the court, entering an order on March 4th, dismissing the counter-claim of your petitioners through and by the Morris Wholesale Liquor Distributing Co., Inc., was void, and because under the decisions of the United States Courts and the Courts of Kentucky a layman cannot appear for a corporation, nor can such an order be entered out of Court.

(o) That at said time the issues had been closed, and, that the court had made an opinion finding on April 1st, 1940, that the corporation had been *"dissolved,"* but on April 8th or thereabouts, as appears from the record, a meeting of said corporation in the city of Ashland, Kentucky, was held, called by one Olin, who was not an officer of said corporation, affirming the action of the said Edward Morris, which under the law of Kentucky, Kentucky Statutes 671, cannot have any force for any reason or purpose. In the first place it is aliunde evidence presented to a court after judgment. In the next place, as petitioners allege, the corporation had no authority to pass said resolution until and when it had cancelled the power of attorney to the said Harvey H. Smith, *under the laws of Kentucky,* but the said court refused to have said open hearing resulting that the said Harvey H. Smith could not cross-examine said Edward Morris, the said J. W. Chapman and the said Olin, to determine whether or not a fraud had been practiced on the Honorable United States District Court.

(p) That thereafter, notice of appeal was filed with the Clerk of said District Court, from all of these orders which the Judge had made in chambers; and also a motion to hear and determine a bill of exceptions, in order that these pleadings that were not a matter of record might be included as a part of the record. That the court refused and denied said motion, and made a finding that he had denied a bill of exceptions in the case, which had never been presented to the court by your petitioners, or Harvey H. Smith, *but only a motion for such a hearing.* The refusal of a Bill of Exceptions in Kentucky voids the judgment.

(q) That it is the law of Kentucky that a motion for a Bill of Exceptions always lies to include, in the files of said cause, any pleading that has been offered and rejected by the court or any evidence that has been admitted or denied by the court. And your petitioners allege that under the laws of the United States, it was the duty of the Honorable Mac Swinford to allow said hearing and to determine whether said Bill of Exceptions should be settled by him or not, and if he refused to grant said hearing, to enter a proper order or finding based upon the applications then presented to the court when either party to the litigation demanded it.

(r) That in furtherance of the plan and scheme to secure a judgment in this case by the said Martin and the said Reeves, and their attorneys, an agreement was prepared whereby the said Edward Morris and the Morris Wholesale Liquor Distributing Co., Inc., should pay to the State of Kentucky in satisfaction of their claim, the sum of $500, when as a

matter of fact, and as a matter of law, the said Morris Wholesale Liquor Distributing Co., Inc., was entitled to a judgment of approximately $22,000, the plaintiffs being in default, both in pleadings and in default as a party plaintiff—against the Commonwealth of Kentucky.

(s) That on May 15, 1938, the entire claim of the said Morris Wholesale Liquor Distributing Co., Inc., was assigned to trustees, your petitioners, George S. Houston and Hargis Langdon, both of whom had claims against the said Commonwealth of Kentucky for taxes unlawfully paid to said Commonwealth, both import and domestic. That at and after the time said agreement was made, the Morris Wholesale Liquor Distributing Co., Inc., had no legal interest in its said claim against the Commonwealth of Kentucky because the title to the same was in the said trustees. *That no judgment can be rendered in a cause of action of this character until and when the trustees are served in said* action, if the facts shall become known to the court, but the court entered a judgment on an agreement between the plaintiffs, James W. Martin and H. Clyde Reeves, and the Morris Wholesale Liquor Distributing Co., Inc., settling all claim that the Morris Wholesale Liquor Distributing Co., Inc., had against the Commonwealth of Kentucky, amounting to approximately $22,000. That at said time your petitioners had an interest in the liquor possessed by the Commonwealth of Kentucky and these assets were in the possession of the United States District Court, which had taken its jurisdiction from the Franklin Circuit Court; (Ky. Code Section 80). That there were other questions, the question of service of summons, of the ser-

vice of attachment, affecting the jurisdiction of the Franklin Circuit Court, when said attachment was sued out, which as a matter of right, under Federal, and State law of Kentucky, must be determined by the United States District Court. Franklin Circuit Court has no jurisdiction to enforce criminal penalties under Criminal Statutes decided by Court of Appeals. That the Honorable Mac Swinford refused to determine any one of these questions at an open hearing, but without such hearing, denied a motion to dismiss said attachment and to enter into a consideration of said question of jurisdiction of said Franklin Circuit Court, which rulings of the court are filed herewith and made a part of this petition, Exhibit S. Statute, Section—4028-9 and 4281, Code Section 489.

SEE EXHIBIT "X" FOR ED MORRIS MOTION

As stated, the Franklin Circuit Court had no jurisdiction because penalties were sought to be collected under a statute which provided for criminal imprisonment. If the offense is an indictable one either by information or by grand jury, the penalties must be collected as in any other civil action where the debt may be denied, not by denial and answer, but by a plea of "not guilty," as decided in L. & N. vs. Commonwealth, 112 Ky. Rep. 643, and 77 Ky. Rep. 625. In other words, the trial by jury is guaranteed in order to determine whether there is any basis for the penalties. This is done ordinarily by a plea of "not guilty," which the defendant has the opportunity to present. When the penalty is imposed, then an action may be brought, but until then the court will have no jurisdiction unless it is alleged and

shown that such action had been taken on the authority of the Auditor. Therefore, the Franklin Circuit Court had no such jurisdiction by reason of the imprisonment clause in the act of 1934 or 1936 and if it be construed to be a civil action, then the procedure must be to collect the penalty by fine, and a plea of not guilty may be interposed by the defendant, and if it is adjudicated that the penalty has accrued then suit may be brought and attachment may be had to collect penalties; otherwise, it cannot be collected. Suit for penalties must be brought by the State Auditor, not by Commissioner *under the* 1934 Act and Sec. 112-5 and 4169 Stat.

The imprisonment clause is as follows:

SECTION 22, ORIGINAL LICENSE ACT: (1934) PENALTY CLAUSE

> "In addition to the remedies herein granted, the Commonwealth for such violations, any person who shall violate any of the provisions of this act will also be deemed guilty of a misdemeanor and punished by fine of not less than $50.00 nor more than $1000.00, or by imprisonment of not less than 30 days nor more than one year, or by both such fine and imprisonment."

AUDITOR MUST SUE.

> Section 10 of the Original Act 1934: "On the failure of any person, liable therefor, to pay the taxes imposed herein within fifteen days after the same has become due, he or they shall be deemed delinquent, and a penalty of twenty per cent on the amount of license tax due shall attach, and the *Auditor* shall at once cause such proceedings to be instituted for the collection of such license, with such interest and

penalties as may be provided by law for the collection of other taxes."

The *Auditor* did not authorize the suit or the penalties, against the Morris Wholesale Liquor Distributing Co., Inc., *so the procedure on this ground was void.* Revenue Commissioners had no authority —See Exhibit "Y". Atty. Gen. must be a party.

(t) That on or about the 29th day of April, 1940, this agreement was entered into and filed before the Honorable Mac Swinford, who then entered a judgment thereon confirming said agreement, so that by said agreement it was thought and believed, as your petitioners allege, that your petitioners and all persons who had joined in the agreement of May 15, 1938, would be estopped and barred from recovering their said taxes from the Commonwealth of Kentucky, it being provided in the Act of 1934 that all such actions should be brought within two years from the time of the payment of said taxes, and that this action had been brought within two years from the time of the payment of the taxes; and although the Honorable Mac Swinford knew and understood that the said James W. Martin, at the time said agreement was made, was not a party to said action, and had been dismissed as plaintiff by operation of law, and knew that the Commonwealth of Kentucky could not in itself, without an officer, maintain said action, and knew that H. Clyde Reeves had not been made a party to this action, within the knowledge of your petitioners or the attorney for the Morris Wholesale Liquor Distributing Co., Inc., nor had any motion or order dismissing him as attorney, been made, nor any service been had upon

the said Harvey H. Smith, or your petitioners or the Morris Wholesale Liquor Distributing Co., Inc., at any time, but he permitted said filing of said agreement as his judgment as Judge to pre-adjudicate said claims, denying your petitioners a hearing.

(u) That it is the law established by the Court of Appeals in Kentucky, the highest court in Kentucky, that each and every corporation doing business in Kentucky must qualify to do and perform that business by appointing a service agent in said state upon whom service may be had. If the corporation refused to appoint said service agent, the contracts made by it may be enforced against it, but it shall have no right to bring a suit or to defend a suit against any other party or person or corporation. That as soon as your petitioners discovered, from the Secretary of the State of Kentucky, that no such qualification had been made, they immediately filed their motion to the Clerk in the United States District Court of the Eastern District of Kentucky for leave to file their petition to make themselves nominal, as well as actual parties to this action, reviving and substituting the cause in the name of parties plaintiff in interest, who under the Code of Kentucky were the actual parties to this action. Sec. 976, Stat.

(v) That the Honorable Circuit Court of Appeals and the Honorable United States District Court, Respondents hereto, knew and understood that under the laws of Kentucky that said taxes had been illegally collected on all liquors imported into Kentucky, and under the following statute: (Act of April 30, 1936). (Also privilege tax of 5 cents).

> "It shall be unlawful for any person to ship or transport, or cause to be shipped or transported into the State of Kentucky, any distilled spirits from points without the state of Kentucky, and without first having obtained a permit from the State Tax Commission, so that payment of such taxes and permit fees as are required by law have been paid and shall accompany said shipment.
>
> "Distilled spirits manufactured in Kentucky purchased and shipped outside of the State of Kentucky, and then reshipped into the State of Kentucky, *is subject to the* 5 *cent per gallon import tax.*
>
> "Nothing in this Act shall be construed to require the payment of the tax more than once."

They also knew, and it was made to appear to them, that the Tax Supervisor of Kentucky, Joe B. Williams, had testified to the following:

> "The wholesaler must purchase a permit before importing the liquor into the State, and in this way the taxes are paid (before the movement of the merchandise into the State)."— Exhibit "T".

Each of said Respondents knew and understood that the 3rd section of the Constitution of Kentucky prohibited the levy of any taxes on any kind of property unless within the jurisdiction of Kentucky, and that no excise tax could be levied for the privilege of bringing any property into Kentucky, (as decided by the Court of Appeals of Kentucky).

They knew that the Kentucky Court of Appeals had decided, which decision was affirmed by the

United States Supreme Court in 305 U. S. 583 — J. Bacon & Sons case, that taxes may not be levied in Kentucky while merchandise is in transportation or before it is removed to within the jurisdiction of the State.

(w) That under the situation as it existed, and under the procedure adopted by the Honorable Mac Swinford, your petitioners applied to the Circuit Court of Appeals for the Sixth Circuit and asked that a mandamus be issued, ordering the said, the Honorable Mac Swinford, to vacate the order dismissing the counter-claim and to permit your petitioners to intervene in said action, as provided in their petition presented to said court, by the said motion to grant leave for them to intervene, it being a matter of right under the laws of the United States, and the laws of Kentucky at said time; and for other mandatory relief inherent in your petitioners, under the laws of Kentucky and the laws of the United States. That a motion for findings filed with the said Circuit Court of Appeals was denied without any findings on the part of the court, and a motion for findings by your petitioners was altogether denied by the court, as was the petition for re-hearing on the 15th day of May, 1940. That after the original petition for mandamus was denied, your petitioners filed application to the court for leave to bring up the cause of action pending before the Honorable District Court for the Eastern District of Kentucky by Mandamus or appeal from a final judgment, which the Honorable Mac Swinford declared had been entered by agreement of the actual parties qualified to appear in said court in said cause.

(x) That your petitioners are without relief and are without remedy, and that the arbitrary action of the Honorable Sixth Circuit Court of Appeals, denying said mandamus and denying petitioners' motion for findings, and the arbitrary action of the Honorable Mac Swinford, as alleged, present a cause to this Honorable Court for a writ of Certiorari. That your petitioners allege that under this hearing, before this Honorable Court, it will be found that the Act of 1934 and the Act of 1936, license and tax acts respectively, permit the filing of the cross-petition or an action to recover taxes collected in the manner in which they were collected in this cause. That your petitioners have a right to litigate said question, and they have been denied due process of law by the arbitrary action of the respondents and each of them, and they attach as Exhibits (A. to Y.) to their petition, and make the same a part hereof, showing the facts as alleged in their said petition and showing that without said acts referred to, your petitioners had the right under the laws of Kentucky to collect said taxes owing to them, either directly or by assignment.

Carroll's Code: (Revivor) Kentucky. (Quoted in Substance).

> Section 502. "If not made by consent, the order shall be served, in the same manner as a summons, upon the party adverse to the one making a motion, and the first term commences not less than ten days after such service, the party upon whom it is made may show cause against the revivor, and if sufficient cause be not then shown, the action shall stand revived. The order of the court reviving said action must

be duly entered by the court. The limitation of such revivorship in within one year from the date of the death of the party, (or separation from office)."

Section 511: "If the action is not revived, the opposing party may have an order to strike the action from the docket and for costs against the plaintiff." (See Motion to Strike, Feb. 14.)

(y) The petitioning parties hereto, by and through Harvey H. Smith, heretofore, on the 29th day of September, 1939, made a motion to dismiss said action, and followed it up thereafter, on the 14th day of February, 1940, tendered their motion to strike the motion of Edward Morris, and the order of the court sustaining his motion to dismiss the cross action, after March 4, 1940. Later, on February 9, 1940, the Honorable Mac Swinford, as Judge of said court, permitted, by order, the appearance of Sam Rosenstein, J. J. Leary, and J. W. Chapman, in the case, who by agreement worked together; the said Judge and the said attorney, then knowing that they were subject to a penalty for appearing in such cause, and also liable to damages for appearing in said cause, yet the said Honorable Mac Swinford gave no heed or attention to the rules of the Supreme Court of the United States or the laws of Kentucky, and refused, on March 4, 1940, on demand, by Harvey H. Smith for such a hearing, to grant such hearing; and entered forthwith an order dismissing the cross-petition and counter - claim of your petitioners, after refusing, on the 14th day of February to allow the filing of the motion for parties and the motion to strike; and by virtue of his order, thereafter continued said motion to

strike until after he did render order dismissing said action. That the action of the said Honorable Mac Swinford was in violation of the practice rules of the United States Supreme Court, and the laws of Kentucky, controlling this action, and his conduct thereby deprived your petitioners of due process of law, contrary to and repugnant to the 5th and 14th Amendments to the Constitution of the United States, and deprived them of the right of trial by jury on the issue of facts precipitated by said motion to strike, and his allowance of Edward Morris to appear in person in said court, the said Edward Morris being a layman, and attempting thereby to represent a corporation; and in order to bolster the judgment of the said Respondent, and then openly, from the bench, on April 1, 1940 ordering the said J. W. Chapman, who was not an attorney in the case, and the said Edward Morris, to require the Morris Wholesale Liquor Distributing Co., Inc., (dissolved) to present to him a resolution of said corporation, affirming the order which he had made on March 4th, 1940 which, in respect to this matter, was a final order, and thereupon, on the 8th day of April, 1940, a resolution, marked Exhibit J, attached hereto, was presented to said court, over the objection of Harvey H. Smith, who then and there had the sole right under the laws of Kentucky, and under the laws of the United States, to appear and defend said action in respect to your petitioners and all others interested as actual parties; this was done in spite of the fact that the said Respondent, the Honorable Mac Swinford, had made a finding, on April 1, 1940, that the said corporation had been "dissolved," Constituted an unjudicial proceeding. That at said time, the said

respondent knew and understood that under the laws of Kentucky, the Morris Wholesale Liquor Distributing Co., Inc., could not defend any action or prosecute any action, and that it was necessary then and there to preserve the money and the assets involved in the action, to substitute parties that might proceed according to law.

That on the 29th day of April, 1940, the said J. W. Chapman, pretending to represent the Morris Wholesale Liquor Distributing Co., Inc., and the said J. J. Leary and the said Sam Rosenstein and the said H. Clyde Reeves, who had never been made a party to this action, and the said James W. Martin, who had by operation of law disappeared as a party plaintiff in this action, to enter into an agreement to settle a claim, certain by default, of $22,000, for a pretended sum of $500, and thereby the said respondent placed the seal of the Honorable District Court upon such an agreement, knowing at said time that none of the parties had a right to appear, either for the Commonwealth of Kentucky or for the Morris Wholesale Liquor Distributing Co., Inc., and there entered said pretended judgment, settling the controversy between the Morris Wholesale Liquor Distributing Co., Inc., and the Commonwealth of Kentucky and James W. Martin, admittedly an outsider and stranger to the record, as was H. Clyde Reeves. This agreement was made, and this order was made, knowing the irregularities that had involved this case by the unlawful action of the said J. W. Chapman, the said Edward Morris, the said J. J. Leary, the said H. Clyde Reeves, the said James W. Martin, and the said Sam Rosenstein, all of the said attorneys being subject to a damage action and a fine for ap-

pearing in this cause, the said Sam Rosenstein and the said J. J. Leary, having no legal authority to impose H. Clyde Reeves or James W. Martin, as parties to this action, as a matter of law, nor to appear in this action, and the Respondent court, under the decisions of the Sixth Circuit Court of Appeals, Fordson vs. Jacks, 7 F. (2) 117, which had previously held that such a judgment without a party plaintiff was absolutely void.

That the respondent court, the Honorable Mac Swinford, as Judge, knew and understood all of these facts, and without giving a full and open hearing to your petitioners or to the said Harvey H. Smith, proceeded to endorse, by affirmation, the settlement of this cause and make it a judicial record in his court, which conduct of the said Honorable Mac Swinford was subject to review, as a matter of right, under a writ of Certiorari filed in the Circuit Court of Appeals for the Sixth Circuit, and not by appeal, and by mandamus. Three motions to dismiss—No Auditor—No Plaintiff—No Atty Gen.

That your petitioners filed a motion for findings and filed findings as provided in rule 52. That neither the said Honorable Mac Swinford, nor the said Sixth Circuit Court of Appeals would make said findings, *which as a matter of right must be made,* by each of said courts, without demand of your petitioners, but which demand was made. And thereby your petitioners' contract with the said Morris Wholesale Liquor Distributing Co., Inc., was impaired, in violation of the 14th Amendment to the Constitution of the United States. U. S. C. A.—686.

That the order made on March 4th, affected the interest of your petitioners, as shown as follows:

EXHIBIT "A"

> "The defendant, Morris Wholesale Liquor Distributing Co., Inc., having appeared in open court through its Secretary, Edward Morris, and having advised the court that it does not desire to prosecute the counter-claim, cross-petition and set off heretofore filed herein against the Commonwealth of Kentucky, et al, and having moved the court to dismiss its counter-claim, set off and cross petition, and the court being advised and having considered the same, it is ordered and adjudged that the counter-claim, cross-petition and set off heretofore filed herein against the Commonwealth of Kentucky, James W. Martin, Commissioner of Revenue, H. Clyde Reeves, Commissioner of Revenue, et al, be and the same is hereby ordered dismissed, *with prejudice, at the cost of the Defendant.*"

That this order was made by the court without a hearing, over the objection of Harvey H. Smith, who had demanded that evidence be furnished of the authority of Edward Morris, and that Edward Morris be sworn as a witness that he might be cross-examined, *which is a constitutional right of your petitioners,* and of the said Harvey H. Smith, whose services as counsel in numerous actions for the said corporation have not been paid. But the said, the Honorable Mac Swinford, refused to set said cause down for hearing, and had at that date refused to sustain petitioners' motion to dismiss the plaintiffs' action for want of proper parties on the 9th day of February, and prior, as shown by the records of this court, but as a matter of fact, filed on the 21st day of January, 1940, with the said clerk. That in

order to make said motion to dismiss, a copy was filed with the Clerk and one was sent to the Judge, and on the records of this Honorable Court, *On February 9th*, appeared the following answer to the filing:

> "Motion to dismiss for want of proper parties, ordered filed. (No Auditor, Act of 1934—No Plaintiff.) No Atty Gen. Sec. 112-5 Stat.
>
> Motion to dismiss filed by defendant. (Morris Wholesale Liquor Distributing Co., Inc.,) duplicate of above."

Under the laws of Kentucky, existing at said time, no action can be dismissed over the objection of an attorney for a client by the client unless it shall be made to appear to the court that the services of the attorney have been settled for or that the opposing party has received notice of the claim of said attorney for attorney's fees, and is financially responsible; who will then be prevented from entering into any agreement of settlement without becoming liable for said fees; or if it shall appear that the said moving client has the proper authority, *which the court must find,* but is insolvent, then the *action* must be continued for the benefit of the parties interested and for the benefit of counsel.

But the court ignored these well-established principles of law in Kentucky, and refused to grant a hearing or to receive any evidence concerning liability to petitioners or Harvey H. Smith as requested.

11. That it was necessary, under the laws of Kentucky, when said motion was presented for parties, to allow the filing of said petition, and to

allow the issuing of summons as a matter of right, to the Attorney General of the State, which is required by the Code of Kentucky and Rule 5 (e) United States Rules, and on the successor of James W. Martin as Internal Revenue Commissioner, in order that they may make a proper showing, or proper objection, or inform the court why the said H. Clyde Reeves had not been revived as a party within six months to the said James W. Martin, which under 26 Kentucky Reporter Bensinger vs. Funk, 656 and decisions from 1826 down to and including the present time, had been the law of Kentucky, and which decisions provide that where the time to revive is passed, the party to the action disappears by operation of law, and no motion to dismiss the name of his counsel shall be necessary, but that said counsel who appear thereafter, are subject to the penalties provided by the Statute. All of which was presented to the Sixth Circuit Court of Appeal by mandamus, and all of which would have been presented to said court by appeal, but that the said order entered on April 29, 1940, settling this cause, and the judgment dismissing the said cross-petition, are, under the decisions of the Sixth Circuit Court, U. S., void, and under other existing decisions at said time, no appeal can be allowed from a void judgment or order of the court. That for this reason and other reasons, an application was made for a mandamus to direct the respondent Honorable Mac Swinford to vacate said order, and to substitute for Morris Wholesale Liquor Distributing Co., Inc., the names of your petitioners; and therein your petitioners made motion for findings, and the said Sixth Circuit Court of Appeals refused said findings, and re-

fused to make findings or offer any relief to your petitioners, but entered an order on May 15, 1940, arbitrarily denying said mandamus without giving any reasons therefor—making no findings.

Petitioners allege Clifford Smith, contract attorney, alleged, not authorized to appear by law, at no time. (See affidavit.) Sec. 112-5 Stat.

That the action of both courts, the Sixth Circuit Court of Appeals, and the United States District Court for the Eastern District of Kentucky, violated the codes and laws of the State of Kentucky and violated the rules of the Supreme Court of the United States, 52 (A), and violated the 14th and 5th Amendments to the Constitution of the United States, and denied to your petitioners due process of law and the equal protection of the laws of the United States. That in the plain mandatory provisions of the statutes of the State of Kentucky, and the United States, the Honorable Mac Swinford either repudiated or ignored them, and in the application of your petitioners to the Circuit Court of Appeals for the Sixth Circuit, the said court refused, either to examine grounds there alleged, or affirm the action of the said Respondent, the Honorable Mac Swinford. That the conduct and the action of the respective Respondent courts, in denying complete and absolute relief to your petitioners, is a denial of due process of law and the equal protection of the laws of the Constitution of the United States, Amendments 4, 14 and 7.

The Acts of 1934-1936, of Kentucky, The Beverage Control Act of 1934, the Liquor Tax Act of 1936, and the Beverage Control Act of 1938, impaired the

contract of your petitioners made on May 15th, 1938, and the enforcement thereof; and refusal of the said Martin and the said Reeves and the non judicial acts of the said Mac Swinford, denied them equal protection of the laws of Kentucky, and the due process thereof, and issuance of attachment to Phillips, Sheriff of Franklin County, which, if enforced at all was enforced by another without legal authority, deprived the petitioners of due process and the equal protection of the laws as provided in the Constitution of the United States, 14th Amendment, 7th Amendment, and 5th Amendment.

Therefore, the said Writ should issue to the Circuit Court of Appeals to give its directions to the Honorable Mac Swinford, Respondent, and Judge, of the United States District Court for the Eastern District of Kentucky. 1st; to strike the pretended judgment of March 4th, 1940, and the JUDGMENT of April 29th, settling this cause and the claim of the Morris Wholesale Liquor Distributing Company, Inc., and to enter an order on the said counter-claim restoring it to the docket of said court, and an order making your petitioners plaintiffs in said counter-claim, and an order dismissing the petition of plaintiffs J. W. Martin and Commonwealth of Kentucky, adjudicating the costs expended by petitioners, and fixing the fees of Harvey H. Smith against pending assets attached, and an order appointing a Referee to determine the total amount of taxes which, exposed and un-exposed parties, claim against the Commonwealth of Kentucky, both import and consumers taxes, and to enter judgment for petitioners for said

sums to be distributed by the said Trustees, Hargis Langdon and Geo. S. Houston.

HARVEY H. SMITH,
Attorney for Petitioners.

Geo. S. Houston deposes on oath and says he has read the foregoing petition and that he verily believes the facts stated therein to be true.

GEO. S. HOUSTON.

Subscribed and sworn to before me this the 30th day of May, 1940.

ELSIE M. DEWALD, *Notary Public.*

My commission expires 10-29-40.

NOTE: (For convenience of Court ——— record—Exhibits are made a part of Petition, which follows).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Commonwealth of Kentucky, on Relation of James W. Martin, Commissioner of Revenue,

Plaintiff

vs.

Morris Wholesale Liquor Distributing Co., Inc., a corporation,

Defendant.

MOTION FOR LEAVE TO FILE PETITION

EXHIBIT B.

Comes now the Morris Wholesale Liquor Distributing Co., Inc., a corporation, by Harvey H. Smith, its Counsel, and moves the Court to allow the filing of the intervention petition of George S. Houston, Blue Grass Liquor Company, Inc., Hargis Langdon, et al.

The grounds of this petition are that they are actual parties, to the controversy now between the Commonwealth of Kentucky, on relation of James W. Martin, and that it is necessary to protect their interests herein, in view of the conduct of Edward Morris an officer and stockholder in the Morris Wholesale Liquor Distributing Co., Inc.,

Respectfully submitted,

Harvey H. Smith, Attorney for Geo. S. Houston, Hargis Langdon, Harvey H. Smith, et al.

4th National Bank Bldg., Cincinnati, Ohio

Presented February 14th, denied after March 4th, order March 13, 1940. Wire sent by Western Union, March 4th demanding hearing—Record in C. C. of Appeals.

EXHIBIT C.

MOTION TO STRIKE RECEIVED FEBRUARY 13th, PRESENTED BY ANTHONY THOMSON FEBRUARY 14, 1940.

Ruled on by the Court Mar. 13, 1940, and to this is added Motion for Judgment and Motion for Summary Judgment, filed on April 9, 1940.

The vital part of these papers is the motion to strike, which if it had been presented on the record, it must have been acted on before March 4th and in it certain allegations were made.

The ruling of the court is as follows:

"Motion to Strike, the motion of Edward Morris to dismiss the Counter-Claim and answer heretofore filed in the above entitled cause, motion for judgment, motion for summary judgment, this cause having been by order of the court dismissed on the 4th day of March, 1940, it is ordered that the motion to file motion to strike, motion for judgment, and motion for summary judgment, is hereby overruled.

Signed: Mac Swinford, *Judge.*"

Certified: A. B. Rouse, *Clerk.*

March 13, 1940.

Motion to Strike filed Feb. 14, 1940.

STATE OF KENTUCKY
COUNTY OF FAYETTE
SCT.

The affiant, Anthony Thomson, says that he is a practicing attorney in the Commonwealth of Kentucky and in the Eastern District of Kentucky — United States District Court, and has been such for the past 15 years.

That on the 13th of February, 1940, he received from Judge Harvey H. Smith a motion to strike the motion of Edward Morris to dismiss the counter claim and answer heretofore filed in the case of J. W. Martin, et al, plaintiffs, vs. Morris Wholesale Liquor Distributing Company, Inc., defendants, which was then pending in the Eastern District of Kentucky at Catlettsburg. That said affiant took said motion (and this motion was for parties) to the United States Clerk at Lexington, where he had received the same and did offer to file with said Clerk the motion above mentioned. That under rule 5-A of the New Rules of Civil Procedure, the Clerk refused to accept and file said motion until copies had been delivered counsel for the other parties or notice of the filing accepted by respective counsel for the litigants.

That this affiant knew nothing of the case until he had received said motion by mail on said day, and affiant then returned to his office in Lexington and advised Judge Smith requesting the names and addresses of counsel for the parties to the said complaint.

Further affiant saith not.

ANTHONY THOMSON

Subscribed and sworn to before me by Anthony Thomson this the 21st day of February 1940. My commission expires June 28, 1943.

BETTY KENNEDY,
Notary Public,
Fayette County, Kentucky

Served by Dailey

Cincinnati, O.,
1940, Mar. 4th, A. M., 10 24

Judge Mac Swinford,
Cynthiana, Kentucky

Request no action Morris case until set down for hearing.

H. H. SMITH.

10:24
March 4th.

EXHIBIT D.

On April 8th, 1940, there was filed a response in the Circuit Court of Appeals by J. J. Leary, Attorney for Respondent, the Honorable Mac Swinford, (the same J. J. Leary who acted as attorney for J. W. Martin, and who was not by order of the said Judge Swinford, allowed to bring in H. Clyde Reeves, as a party plaintiff after six months had expired to revive and who continued J. W. Martin in said action by consent of court, without notice of any kind to H. H. Smith and who was the attorney signing the April 29th judgment settling the cause which was affirmed by the Honorable Mac Swinford Judge).

EXHIBIT F.

ORDER OF THE JUDGE, APRIL 15, 1940:

"This day came James W. Chapman, attorney for the Morris Wholesale Liquor Distributing Co., Inc., *and in compliance with the* order heretofore entered in the above styled case

offered for filing a Resolution signed by Irving Olin, Chairman of the Board of the Morris Wholesale Liquor Distributing Company, approving the action of Eddie Morris, Secretary-Treasurer of the Company, in dismissing the answer and counter-claim of the Company heretofore filed in this action, and agreeing to the entry of the agreed judgment in the above styled action, the resolution being sworn to by Irving Olin before Samuel Morris, Notary Public, Boyd County, Kentucky, the Court being advised, it is ordered that the Resolution be, and it is now filed and noted of record. (41 days after Judgment).

MAC SWINFORD, *Judge.*

April 15th, 1940

Certified:

A. B. ROUSE

A. B. ROUSE, *Clerk.*"

EXHIBIT G.

RESOLUTION PASSED APRIL 8th, 1940.
(After Judgment.)

EXHIBIT H.

CHAMBERS ORDER OF MAC SWINFORD, Judge.

"Came H. H. Smith and offered to file 'Motion to Dismiss.' "

The record, disclosed the following facts:

On February 9th, 1940 at Lexington, Kentucky the Court sat for the purpose of hearing arguments on various motions in this cause, the plaintiff was represented by J. J. Leary, the defendant was present by Edward Morris, duly authorized Secretary and Treasurer, and Harvey H. Smith attorney of record. (Words in parenthesis are counsels.)

The defendant through the said Edward Morris stated in open court that the Morris Wholesale Liquor Distributing Company was no longer an operating company, and had finally been dissolved. That H. H. Smith, attorney of record, no longer represented the defendant company. The request was made by the said Edward Morris in the form of a motion that the court dismiss the answer and counter-claim filed herein as of December 11th, 1939.

On March 4, 1940 an order was entered dismissing the counter-claim, cross petition and set off.

The "Motion to Strike" cannot be filed as part of this record and it is so ordered and adjudged to all of which H. H. Smith objects and excepts.

The Clerk is directed to make the "Motion to Strike" tendered but not filed, and placed with the record.

April 1st, 1940. MAC SWINFORD, *Judge.*

Certified (Signed) A. B. ROUSE, *Clerk.*"

EXHIBIT I.

ORDER MADE AT A PLACE NOT DESIGNATED TO HOLD COURT.

Cynthiana, Kentucky, March 4, 1940

"Honorable A. B. Rouse, *Clerk*
United States District Court
Lexington, Kentucky

Re: Commonwealth of Kentucky, etc. vs. Morris Wholesale Liquor Distributing Company, Cattlettsburg Docket

Dear Mr. Rouse:

I am enclosing herein an Order in the above styled case with two copies. You will please have a copy of this sent to the attorneys for both the plaintiff and defendant.

Most truly,

MAC SWINFORD, *Judge.*"

Refers to Order March 4th, without hearing. (See Rules 4 and 5).

EXHIBIT J.

"This cause was heard upon the petition for writ of mandamus, the show-cause order heretofore entered, and the response of the District Judge thereto, upon consideration whereof,

IT IS ORDERED AND ADJUDGED that the rule to show cause be and the same is discharged and the petition for writ of mandamus be and the same is dismissed.

Approved for entry:

(Signed) XEN HICKS, *Circuit Judge.*

FILED: APRIL 10, 1940" (Finally May 15th.)

EXHIBIT K.

NOTICE OF APPEAL DENIED

"I am this day in receipt of registered letter from you enclosing notice of appeal in the same case No. 1627, on the Catlettsburg Docket.

Yours very truly,

A. B. ROUSE, *Clerk.*"

(Returned)

(Ck. demanded for filing petition for parties —returned).

CHECK SENT FOR FILING OF PETITION FOR INTERVENTION RETURNED:

THE FIFTH THIRD UNION TRUST CO.
13-31 CINCINNATI, OHIO 13-31

Cincinnati, April 19, 1940 No. 161919

PAY to the Order of A. B. Rouse, U. S. Court Clerk
$10.00

FIFTH THIRD UNION TRUST $10 & 00 Cts.

CASHIER'S CHECK T. E. FORD,

A Cashier, Secretary-Manager."

EXHIBIT L.

UNITED STATES DISTRICT COURT
For The
Eastern and Western Districts of Kentucky

Chambers of Mac Swinford, Judge
Cynthiana, Kentucky, October 6, 1939

Mr. Harvey H. Smith
Attorney at Law
Fourth National Bank Bldg.
Cincinnati, Ohio

Re: Commonwealth, etc. vs. Morris Wholesale Liquor Distributing Company
Catlettsburg Docket No. 1766

Dear Sir:

This will acknowledge the receipt of your "Motion to Vacate Findings" and "Brief on Motion" with regard to Judge Swinford's recent Memorandum Opinion on the above styled matter.

You are advised that I am today forwarding your brief and motion to Honorable A. B. Rouse, Clerk, Lexington, Kentucky, for entry.

Most truly,

Davis T. McGarvey, *Secretary.*

(Not a valid order)
Copy to:
Hon. A. B. Rouse, Clerk
U. S. District Court
Lexington, Kentucky.

J. W. Martin had resigned at this order.

EXHIBIT M.

LAW OFFICES
of
CLIFFORD E. SMITH
Peoples State Bank Building
Frankfort, Kentucky

ASSOCIATE: Clyde E. Reed, S. M. Rosenstein, Joseph J. Leary.

General Counsel for: Commissioner of Revenue, Back Tax Section, Commonwealth of Kentucky.

March 2, 1940

Judge Harvey H. Smith,
Attorney at Law,
Fourth National Bank Bldg.
Cincinnati, Ohio

Re: Commonwealth vs. Morris Wholesale Liquor Distributing Company.

Dear Judge Smith:-

I enclose herewith copy of an order that I am today submitting to Judge Swinford for entry.

Very truly yours,

SAMUEL M. ROSENSTEIN

Leary, Smith and Rosenstein had no legal authority to represent the state.

SMR:Y

Encl.

See copy of order sent Judge Swinford by Rosenstein signed by the Judge, March 4, 1940 and wire.

EXHIBIT N.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

COMMONWEALTH OF KENTUCKY, on relation of JAMES W. MARTIN, Internal Revenue Commissioner,

Plaintiff

vs.

MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC.,

Defendant

MOTION FOR FINDINGS ON THE PART OF THE COURT.

Come now the petitioner, Morris Wholesale Liquor Distributing co., Inc., and Harvey H. Smith, counsel, and move the court for findings in this cause:

1. That the court set down this cause for hearing for the purpose of introducing evidence on the

right and claim of Edward Morris to represent Morris Wholesale Liquor Distributing Co., Inc., and discharge Harvey H. Smith, as attorney, and the purpose of showing collusion between the plaintiff, James W. Martin, et al, and the Commonwealth of Kentucky, with the said Edward Morris for the purpose of defeating and stopping this cause of action.

2. The said hearing to be for all purposes in connection with the prosecution of this action and the issues made by the pleading.

HARVEY H. SMITH, *Attorney*

for Morris Wholesale Liquor Distributing Co., Inc.,
Refused to make findings. (The Court).
Mailed, February 10, to Clerk.
Demand by wire for hearing March 4th.

EXHIBIT O.

UNITED STATES DISTRICT COURT
for the
Eastern and Western Districts of Kentucky

Chambers of Mac Swinford, *Judge.*

Cynthiana, Kentucky, April 22, 1940.

Honorable A. B. Rouse, Clerk
United States District Court
Lexington, Kentucky

Re: Commonwealth, et al. v. Morris Wholesale Liquor Distributing Co., Inc.
Catlettsburg Division

Dear Mr. Rouse:

I am returning herein the proposed "Order overruling Motion For New Trial," which you enclosed

with your letter of April 20th. This proposed order has no place in the record and I am therefore declining to sign it.

I have declined to consider any motions made by Judge Smith due to the fact that an Order heretofore entered in this case shows he is no longer the attorney of record. This order should be returned to him with a copy of this letter which is enclosed for that purpose. This letter should be placed with the record.

Most truly

MAC SWINFORD, *Judge.*

(No order entered discharging Judge Smith or substituting another attorney).

Encls.
MS:DM

NOTE: After dictating this letter Judge Swinford left the office and to avoid delay directed me to sign for him.

Davis T. McGarvey, *Secretary.*

EXHIBIT P.

UNITED STATES DISTRICT COURT
for the
Eastern and Western Districts of Kentucky

Chambers of Mac Swinford, *Judge.*

Cynthiana, Kentucky, October 26, 1939

Honorable H. H. Smith
Attorney at Law
Fourth National Bank Building
Cincinnati, Ohio

Mr. Clifford Smith & Associates
Attorneys at Law
Frankfort, Kentucky
Attention: Mr. J. J. Leary

Re: Commonwealth, etc. v. Morris Wholesale Liquor Distributing Co.
Catlettsburg Docket No. 1627

Gentlemen:

I have carefully examined the briefs and authorities in support of and in opposition to the defendant's Motion to Vacate the Findings of the Court. I find nothing to warrant me in sustaining this motion and an order may therefore be prepared and submitted overruling the defendant's motion.

Most truly,

MAC SWINFORD, *Judge.*

MS:DM

Order signed at Cynthiana. Martin resigned on July 1st.—No Subs.—Bound to sustain dismissal under Ky. law and rule 25 and Sec. 780.

EXHIBIT Q.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

COMMONWEALTH OF KENTUCKY, EX REL, JAMES W. MARTIN,

Plaintiffs

vs.

MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC.,

Defendants

MOTION FOR BILL OF EXCEPTIONS

Come now the Morris Wholesale Liquor Distributing Co., Inc., by Harvey H. Smith, with power of attorney, and Harvey H. Smith in person, and George S. Houston and Hargis Langdon as trustees, and move the court *for an order to settle the bill of exceptions* in this case, which motion is made upon the following grounds:

1. Whereas, the defendants desire to appeal this cause to the Circuit Court of Appeals for the Sixth Circuit, and desire that the record include all of the matters and things done in this case, all of the orders of the court, and the judgment, opinion, decisions of the court, and the files tendered to the court, and disallowed and allowed.

All of which to show the exceptions of the defendants to all of the orders and decisions, opinions and judgment of the court, to which the defendants except and which are adverse to the interests of the said defendants.

HARVEY H. SMITH,

Attorney for the Defendants and for himself,
510 Fourth National Bank Building
Cincinnati, Ohio.
CHerry 6772.
Mailed April 16th.

EXHIBIT R.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG

Commonwealth of Kentucky, etc.,
et al

vs. No. 1627

Morris Wholesale Liquor Distributing
Co., Inc.,

ORDER

This day came Harvey H. Smith and offered for filing motion to file bill of exception, *and bill of exceptions,* in the above styled case. It appearing from the record that Harvey H. Smith is no longer an attorney of record for the defendant herein, the filing of the motion to file bill of exceptions, and the bill of exceptions, is hereby denied.

MAC SWINFORD, *Judge.*

April 17, 1940 Certified:

(Signed) A. B. ROUSE

A. B. Rouse, *Clerk.*

(Smith presented no Bill of Exceptions) (No order made as required by Kentucky and Federal law striking name of Harvey H. Smith at a hearing).

EXHIBIT S.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
CATLETTSBURG

Commonwealth of Ky., by ex rel Martin,

vs. No. 1627

Morris Wholesale Liquor Distributing Co.

1938

June 1—Transcript from Franklin Circuit Court filed.

Aug. 2—Motion to dismiss attachment filed by deft.

Aug. 29—Motion to quash service and motion to dismiss petition and dissolve attachment filed. (No hearing).

Aug. 30—Motion to remand, filed by plff. (In default)

Dec. 31—Motion to remand overruled.

1939

Jan. 25—Second motion to dismiss tendered. (No service from a court with jurisdiction).

Sept. 29—Opinion of Court overruling all pending motions.

Oct. 9—Motion of deft. to be allowed to file motion to vacate findings of opinion. Order allowing same. Two motions to vacate findings filed. (Plff. in default).

Nov. 6—Order overruling motions to vacate findings. Order entered in accordance with opinion of Sept. 29, 1939, overruling motion to discharge attachment and other pending motions. (Plff. still in default).

Dec. 11—Motion of deft. to be allowed to file answer. Order allowing same. Answer and counter claim filed. (Jury demand — No reply filed).

1940

Jan. 17—Notice to take depositions of Saml. and Edw. Morris. Spa. issued.

Jan. 15—Motion to strike and to make more definite and certain filed. Motion for pre-trial conference filed. (No leave granted) — *objection.*

Feb. 9—Motion to vacate notice to take depositions, motion for judgment *pro confesso* on deft.'s counterclaim filed by deft.

Motion to dismiss for failure of proper parties. Statement of Edw. Morris filed. (No Auditor—No Plaintiff).

(*This record shows Continuous default*).

Commonwealth of Kentucky, by etc.

vs. No. 1627

Morris Wholesale Liquor Distributing Co.

1940

Jan. 17—Proof of service of notice to take depositions filed.

Jan. 15—Motion to strike and to make more definite and certain with memo. in support of same; motion for pre-trial conference filed by deft. Order filing same.

Feb. 9—Motion to vacate notice for depositions with affidavits of H. H. Smith and W. A. Schuberth. Motion for judgment pro confesso. Brief on same, all filed by deft. Order filing.

Motion to dismiss for want of proper parties, supplm. brief, filed by deft. Order filing. (Not passed on).

(No Auditor—No party plaintiff).

Motion to dismiss filed by deft. (Duplicate of above).

Statement filed by Edward Morris that H. H. Smith is no longer counsel for deft. and that James W. Chapman represents deft. Motion to dismiss counterclaim and set-off (made by Edward Morris).

Mch. 4—Order dismissing counterclaim, cross-petition and set-off, at cost of deft.

Mch. 12—Motion for finding of fact and proposed findings of fact tendered by H. H. Smith. Order overruling motion to file same. Exception. (Presented Feb. 14th, received not filed).

Mch. 13—Motion to strike motion of Edw. Morris to dismiss counterclaim, etc. heretofore filed; motion for judgment; motion for summary judgment; all offered by H. H. Smith and Anthony Thomson. Motion to file overruled. See Thomson sworn affidavit.

Motion for new trial, together with affidavits and copies of affidavits, copies of various motions and orders, offered by H. H. Smith. Motion for new trial, etc. ordered filed and set for hearing on April 1st, 1940, at 7:30 P. M. in Court Room at Covington.

EXHIBIT T.

Original of Williams Sworn Testimony Issue of Import Taxes:

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

COMMONWEALTH OF KENTUCKY, on relation of JAMES W. MARTIN, - - *Plaintiff*

vs.

MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC., a Corporation of Catlettsburg, Kentucky, - - - - - - - - - - - - *Defendant*

TESTIMONY OF JOE WILLIAMS, SUPERVISOR OF TAXES OF KENTUCKY.

September, 1939.

Statement of Joe Williams, Tax Supervisor for the State of Kentucky, made on oath in a proceeding between the Kentucky Alcohol Beverage Control Board and Morris Wholesale Liquor Distributing Co., Inc.:

Q. Joe, how much import taxes has the Morris Wholesale Liquor Distributing Co., Inc., paid to the State of Kentucky?

A. I could not tell you from my own knowledge.

Q. You gave me the figures before.

A. I can get them and put them into the record.

Q. And also the tax. You will put that in the record?

A. Yes, sir, I will be glad to do that.

Mr. Williams thereafter inserted in the record $9130.00 import taxes. He also described the manner that the tax was collected in substance, as follows:

"Inasmuch as the law provides that a Kentucky importer must pay the import tax and have a permit in his possession before the merchandise is imported, we have adopted a sys-

tem of having the Kentucky importers purchase permits from the Department in advance, at which time they pay the import tax upon the quantity of merchandise called for in the permit. These permits are issued in triplicate, one copy is kept by us, one sent to you, and the third copy to the out-of-State shipper, or to you, depending upon your request. The out-of-State shipper must deliver the copy we send to him, along with the merchandise for transportation, and when the whiskey which is imported is delivered in Kentucky, he must endorse the copy of his permit so as to specify the exact amount of whiskey delivered. The permit may be used until the full quantity called for upon the face of the permit has been shipped. The copy of the permit must be returned to the Department within ninety (90) days, but we will give you credit on any unused balance."

(Hearing in May to cancel license).

I hereby certify that this is an exact copy of the testimony of Joe Williams, tax supervisor of Kentucky, in the above entitled case.

H. H. SMITH.

Subscribed and sworn to before me by H. H. Smith, this 30th day of April, 1940.

ELSIE DEWALD, *Notary Public*

My Commission expires
October 29, 1940.

United States District Court

(Certified: A. B. Rouse, Clerk)

"I am now represented by attorney J. W. Chapman, of Ashland.

(Signed) ED MORRIS."

He then filed a motion to dismiss the counter claim, makes a statement in court that the corporation has been dissolved, and on April 1st, 1940, the court makes the finding that the corporation has been dissolved, but in fifteen days thereafter receives evidence of a resolution from said corporation affirming his opinion on March 4th, 1940.

Auditor must proceed under said section providing penalty—Six months statute put the plaintiff out. All motions (four) denied for want of parties—Judgment, "Y" void;

EXHIBIT I.

Petitioners allege:

March 13th, 1940 this Honorable Judge entered an order dismissing motion to strike motion of Ed Morris to dismiss counter claim of petitioners by Morris Wholesale Liquor Distributing Company and gave as his reason:

> "This day came Anthony Thomas and Harvey H. Smith, signing as attorneys for parties defendant, Morris Wholesale Liquar Distributing Company, Inc., and offered for filing Motion to strike the motion of Edward Morris to dismiss the counter claim and answer, heretofore filed in the above mentioned cause,
>
> Motion for Judgment,
>
> Motion for Summary Judgment,
>
> this cause having been by order of *the court dismissed* on the 4th day of March, 1940 it is ordered that the motion to file
> 'Motion to strike,
> Motion for judgment
> and motion for Summary Judgment', be overruled."

THESE MOTIONS WERE NOT FILED THAT DAY, but Feb. 14th, 1940, under *Rule* 5; and the COURT never made any order March 4th dismissing counter claim, because no MOTION was filed by the corporation nor any legally authorized person, and the COURT was not in session that day, petitioners are informed, but said order was made by the *Judge at Cynthiana,* a place, not by law, where a judgment can be rendered.

RULE 5: "judge may permit the papers to be filed with him, in that event he shall note thereon the *filing date,* and *forthwith transmit them to the office of the clerk".*

Did it take him from Feb. 14*th to March* 13*th ?* or what ? "all papers required to be served on a party shall be filed with the Court EITHER BEFORE SERVICE *or within a reasonable time thereafter." Did the Clerk give Thomson a correct reason Feb.* 14*th?*

"But no service need be made on parties in default."

Petitioners say that the "Motion to Strike" seemed to have confused the JUDGE, for again on April first he singled it out for a different reason:

"The court being of the opinion that H. H. Smith has no authority to further represent the defendant (Morris Wholesale Liquor Distributing Company) the "Motion to Strike" cannot be filed as part of this record, and it is so ordered and adjudged, to all of which H. H. Smith objects and excepts. The Clerk is directed to make the "Motion to Strike, tendered but not FILED, and placed with the record" April 1st, 1940, Certified (signed) A. B. Rouse, Clerk

MAC SWINFORD, Judge.

SO THE MOTION TO STRIKE OFFERED FEB. 14th was never filed as Rule 5 provides it must. No hearing had, either, on it.

BUT this remarkable order of April 1st, further recites:

Finding of FACTS (letter of Judge March 4th, says there was none.)

But according to the Judge he was getting facts. WE QUOTE:

> "and that the STATEMENT of Edward Morris made in open court at Lexington, Kentucky, on February 9th, 1940 was *re-affirmed* by him personally and James W. Chapman, and that it was the will of the defendant company which WOULD be indicated to the court, by filing with the record, within a few days a resolution expressly providing that said corporation ratified and approved the statement of Edward Morris heretofore referred to, and further, that H. H. Smith, did not represent the defendant company, and that the defendant company desired to dismiss its counter claim heretofore filed, the court being of the opinion that H. H. Smith has no authority to further represent the defendant."

Thus there were findings, but based on what? Where is there in this case a *first affirmation?* Where did he get the evidence to make a *finding of fact,* that H. H. Smith did not represent the corporation?

EVIDENCE MUST BE SWORN TO IN KY.

Mr. Smith, Feb. 9th, 1940. *"I demand this witness be sworn."* The court refused:

March 4th, Cincinnati, Ohio. Judge Mac Swinford, Cynthiana, Ky.

"Request no action in Morris case until set down for hearing." (Hearing denied).

H. H. Smith.

In the first place, Chapman was not present Feb. 9th, and signed *no motion to dismiss,* but Ed Morris signed it. The evidence was to be furnished in a few days according to the Court's finding, but no chance given to show it was affirmed to the Court falsely.

Mr. H. H. Smith must have a day in court to show his contract with the Corporation, which excluded Ed Morris of the right or Chapman to appear in the case. The Court refused to hear this matter. The *Motion to Strike* was the *heart of the deal from head to heel.*

Section 97 Kentucky Code provides: (quoted in substance)

"Proceedings upon cross actions shall be the same as those upon petitions; and if the issues are of a common law nature made by the petition the issues must be tried to a jury."

Doyle vs Offitt, 135 Ky-7th Amendment Constitution U. S.

"The right of a TRUSTEE (Houston and Langdon) to intervene is absolute."

Swift vs Black Panther Oil Co. 244 Fed. 20 Rule 37.
Western Union vs Mex. Trust 221 Fed. 545, 91 Fed. 570.

"The foreclosure of a mortgage or lien presents absolute right.

Louisville Trust Company vs Louisville Railway Company 174 U. S. 674."

Judge Swinford denied filing of motion and later petition.

(Following Letter)

United State District Court
Office of the Clerk
Eastern District of Kentucky.

Lexington, Kentucky, April 30th, 1940

Mr. Harvey H. Smith
Attorney at Law
Fourth National Bank Building
Cincinnati, Ohio

Commonwealth of Kentucky vs Morris Wholesale Liquor Distributing Company No. 1637 on the Catlettsburg Docket

Dear Sir: You will receive a copy of a letter signed by Judge Swinford addressed to me, directing that the intervening petition of George S. Houston, et al be returned to you.

I am complying with that request by returning the petition, the copy, and the cashier's check of the Fifth-Third Union Trust Company, for $10.00

Yours very truly,

Signed—A. B. ROUSE, Clerk

ABR:LR

Here is finally a flat refusal by the Judge after a planned effort from Feb. 14th to get a ruling, and therefore a denial of a fixed constitutional right.

(1) Intervention or substitution is a matter of right any time during the term of court. See Kentucky Codes 20 to 28.

Clifford Smith could not appear at any time as counsel. 112-5, Ky. Stat.

NO AUTHORITY

No. 2.

Judgment (in Kentucky) without revivorship is void."

Asher vs Fordson Coal Co. 249, Kentucky, 498-7.

Fordson Coal Company vs Jackson 7 Federal (2) 117. (6th Circuit.)

Sackett vs Grinstead 176 Ky. 91.

Murphy vs Fryer I. Kentucky Reporter 348.

"Cannot be done by agreement, must be done by order of the court according to Code-section 503 —Statute, sec. 999."

Williams vs Thompson, 80 Ky. 325.

Baker vs Davis 221 Ky. 527.

"Summons must issue on petition to revive." Barth vs Barth 102 Ky. 56, Code 501-2-3.

Fishback vs Green, 87 Ky. 107-112.

"Within 30 days after service action may be revived, if six months has expired when petition is filed and service had."

Louisville, vs U. S., 97 S. W. 1096.

"Code must be complied with unless adversary agrees, and if such an agreement is made may be revived after 12 months."

Apperson vs Fulkerson, 7 Ky. Reporter 452.
Asher vs Fordson Coal Company, 249 Ky. 498.

"Unless Revivorship shows on the record judgment entered is void and no appeal lies from a void judgment."

Sixth Circuit Court of Appeals.

Fordson vs Jackson 7 Fed. (2) 117 and 89 Ky. 182. 508-510 Ky. Code.

We allege the Fed. Rule to be the same.

"The successor must adopt the attitude of his predecessor and insist on enforcement of the statute questioned and come in within six months by petition." Rule 25.

Davidson vs Rafferty 39 Fed. (2) 1022.

The rule applies to an action, suit or other proceeding, and all proceedings thereafter (the time to revive). If the revived action in the name of the second officer is had and he continues to threaten with the enforcemer[illegible]f the same statute he is liable.

Gorham Mfg. Co. vs Wendel; 261 U. S. I.

The party affected by substitution must be served and may make his objections. The action abates, no motion to abate is necessary.

Black—71-F. (2) 536.

Martin vs Coe 83 Fed. (2) 606. (Dismissed.)

Petition of Intervention—Motion Denied, presented Feb. 14th, 1940.

Intervention petition must be first filed as in other proceedings in original action, then served by

summons, which is a matter of right and not a matter of discretion.

Section 501 Ky. Code.

Federal Act of Feb. 13th, 1925.

Leary vs. Admr. 224, U. S. 567.

"If the decree interfere with a contract previously made, the actual parties have a right to intervene.

279 U. S. 556, 51 Federal (2) 757.

EXHIBIT Y.

Final Judgment, no party Plaintiff or Defendant here—No Jurisdiction. Smith denied notice. — Atty. Gen. Absent.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY. At Catlettsburg

COMMONWEALTH OF KENTUCKY,
by and on relation of James W.
Martin, Commissioner of Revenue, - - *Plaintiff,*

vs. No. 1627. JUDGMENT
Filed and entered April 29, 1940.

MORRIS WHOLESALE LIQUOR
DISTRIBUTING CORPORATION,
a corporation, - - - - - - - - - - *Defendant*

This cause coming on for hearing, the parties being duly before the Court and the defendant previously having moved the Court to dismiss its counter claim, cross-petition and set-off and the same having been sustained and an order having been entered to that effect on March 4th, 1940, and the parties

having agreed as to a settlement of the claim of the plaintiff herein, it is now ordered and adjudged by the Court that the plaintiff, Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue, recover judgment against the defendant, Morris Wholesale Liquor Distributing Company, a corporation, in the amount of Five Hundred ($500.00) Dollars, and its costs herein expended.

It is further considered, ordered and adjudged that all costs and expenses incurred in connection with the prosecution of this cause in the Franklin Circuit Court of Kentucky and this Court, including the storing and warehousing of the whiskey levied upon pursuant to an order of attachment issued by the Franklin Circuit Court, shall be paid by the defendant.

The parties having agreed, it is further considered, ordered and adjudged by the Court that E. K. Rose, Sheriff of Boyd County, Kentucky, is hereby authorized and directed, upon receipt of a written authorization from the Commissioner of Revenue of the Commonwealth of Kentucky and upon payment of the costs due said E. K. Rose, Sheriff of Boyd County, Kentucky, including storage and warehousing charges, to deliver to the person named in said written authorization, at the place in Boyd County, Kentucky where said whiskey is stored, any and all whiskies, wines and cordials that were taken into possession by said E. K. Rose pursuant to an order of attachment issued by the Franklin Circuit Court in the case of Commonwealth of Kentucky, by and

on relation of James W. Martin, Commissioner of Revenue, v. Morris Wholesale Liquor Distributing Company, a corporation, on March 24, 1938. It is understood and agreed that as a part of the settlement of this cause that the defendant shall be and it is hereby authorized to sell said whiskies, wines and cordials now in the possession of E. K. Rose, Sheriff of Boyd County, upon which evidence is noted on the package that the Internal Revenue Laws of the United States have been complied with, to a person authorized by the laws of Kentucky to receive same, and upon receipt of a notice from the defendant advising the Department that said sale has been effected to a person legally authorized, the Commissioner of Revenue shall, after an investigation discloses that the purchaser is authorized to purchase same, cause to be delivered to the defendant the written authorization hereinbefore provided for the removal of said whiskies, wines and cordials from the custody of E. K. Rose.

This judgment is to be treated as a full and complete settlement and adjustment of all claims asserted by the plaintiff against the defendant herein and of any and all claims that the defendant has asserted or may have against the plaintiff and James W. Martin and H. Clyde Reeves.

MAC SWINFORD ,

Judge, United States District Court for the Eastern District of Kentucky.

Agreed to and approved for entry: 4-29-40.

H. CLYDE REEVES, Commissioner of Revenue.

Clifford E. Smith, J. J. Leary, Saml. M. Rosenstein.
Attorneys for Plaintiff.

James W. Chapman, Attorney for Defendant.

NOTE: Harvey H. Smith was not notified of this hearing, tho his name not stricken as attorney, and no hearing had as to his right to appear. No Auditor's attorney signs here. No. Atty. Gen.

UNITED STATES OF AMERICA
EASTERN DISTRICT OF KENTUCKY
SS:

I, A. B. Rouse, Clerk of the United States District Court in and for the Eastern District of Kentucky, do hereby certify that the annexed and foregoing is a true and full copy of the original Judgment entered and filed April 29, 1940, in the case of Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue, vs. Morris Wholesale Liquor Distributing Co., No. 1627 on the Catlettsburg docket of this Court, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Catlettsburg, this 16th day of May, A. D. 1940.

A. B. ROUSE, *Clerk.*

(S E A L)

By Augusta Rogers
Deputy Clerk.

Attorney General of Kentucky is, with the Auditor a necessary party and only attorney who can appear in this cause for the Commonwealth of Kentucky Statute—112-5.

Com. vs Roberta Coal Co., 186 Ky. 409.

McAlexander vs Wright, 3 AKM 189.

Com. vs. Louisville Property Co., 128 Ky. 790.

Chesapeake vs. Raskamp, 179 Ky. 175.

Sec. 1622 (Auditor) Statute Control License Beverage Act. Sec. 10 of 1934.

Harvey H. Smith deposes and says that as counsel of record and attorney in the courts of record in Kentucky , he has examined the petition herein, and that he affirms it states the facts and a cause if action for a Writ of Certiorari.

HARVEY H. SMITH,
Counsel for Petitioners.

End

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 331

311
20
Hon. — Jnt

Brief for Petitioners

GEORGE S. HOUSTON and HARGIS LANGDON, Trustees, Morris Wholesale Liquor Distributing Company, Inc., by HARVEY H. SMITH, Attorney in Fact, and HARVEY H. SMITH, in His Own Behalf.

Petitioners

vs.

THE HONORABLE MAC SWINFORD, Judge of the United States District Court for the Eastern District of Kentucky, and the CIRCUIT COURT OF APPEALS for the Sixth Circuit, Hon. Xen Hicks, presiding Justice and J. W. Martin, et al.

Respondents

ON CERTIORARI

HARVEY H. SMITH,
1108 Fourth National Bank Bldg., Cincinnati, Ohio
Covington, Ky.

Attorney for Petitioners

(Guarantees violated, 5th, 7th, 14th Amendments, and Art I, Section 8, Constitution of the United States'. Three Unconstitutional Statutes of Ky. imposed.)

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(See the other cases on page 12 on Findings)

Martin vs. Drexel Ice Cream Company 80 Fed. (2) 768 13

Southwestern Bell Tel. Co. vs. San Antonio 75 Fed. (2) 880 and under this citation 295 US 754

Question of Right of Attorney General's necessary appearance, found at page 17.

On the question of failure to revive at page 17, rules and authorities.

On Revivor; citations at page 19—Kentucky and Federal decisions.

Suit cannot be defended or maintained when? pages 23-22: the Oliver case cited vs. City of Louisville, over-rules all cases to the contrary, found at page 22, section 571 (Ky. Statutes) Evidence must be sworn to, Rule 43 (Supreme Court Rules). Clifton vs. Toombs 21 Fed. (2) 698, at page 24, holds attorneys could not appear after default, under Rule 25, and section 780 USCA.

Intervention as a matter of Right, Rule 5 c. 25
Summons must be issued on intervention RIGHT (Ky. Code) 20 to 28; and 501 to 530 (Kentucky Code on entry of Revivor order) page 25.

Roberts vs. Lowe 236 Fed. 204, at page 32.

Revivorship in Federal and State Courts, and authorities there cited **(if not made Court loses jurisdiction)** See also at page 38, Kentucky authorities.

TRUSTEES are necessary parties in substitution, see page 39
Attorney General or Auditor must be a party, Authorities page 40
The motion for judgment at pages .....48 and 49
Franklin Circuit Court had no jurisdiction found at page 50
Decisions of the Court of Appeals.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The authority for the jurisdiction of this court is found in section 347 of the Supreme Court Rules, and Judicial Code, Section 240, and Paragraph 347, sub-paragraph A. (Ohlinger's Rules.)

> "The statute was intended to invest in the Supreme Court comprehensive and unlimited power. It is well established that the power of the Supreme Court to grant certiorari extends to every case pending in a circuit court of appeals. Certiorari may be granted even though the order complained of was not appealable to the Circuit Court of Appeals, and the appeal was properly dismissed by that court for want of appellate jurisdiction."
>
> Forsyth vs. Hammond, 166 U. S. 506
>
> Gay vs. Roff, 292 U. S. 25
>
> Supreme Court Rule 38, sub-paragraph 5.

In the Forsyth case the court said:

> "With reference to this clause, the power is not affective by the condition of the case, as it exists in the court of Appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein."
>
> White vs. Mechanic Securities Corp., 269 U. S. 283.
>
> Lutcher vs. Moore & Knight Co., 217 U. S. 257

Judiciary Act of 1891, the Court has the power to decide the case as it was presented to the Circuit Court of Appeals.

The mandate of the court, to avoid circuity will go directly to the Circuit Court. Lutcher case, Supra.

The Court will consider the point and errors assigned by the petition. Warner Co. vs. Pier Co., 278 U. S. 85. Lagnes vs. Green, 282 U. S. 531. Public Service Comm. vs. Havemeyer, 296 U. S. 506.

The record is so extensive in this case, and covers many questions not necessary to raise here, that we have omitted these records and agreed upon only such as will present the invalidity of the order of March 4th, 1940, and the judgment of April 29, 1940. In this connection, we have not served the record upon Leary and Rosenstein, or Clifford Smith, because they cannot possibly, under the Federal or the State statute be parties to this action, but we have served the Circuit Court of Appeals with a copy of the agreed record left with the Clerk, and not the District Court, because the directions of this court must be to the Circuit Court. While we have mailed a copy of the record to the District Judge and to these pretended counsel, we have not done so officially, as attorneys or the petitioners, because we desire to raise this question in the very threshhold of the cause of action as presented to the Supreme Court of the United States, and this is the preliminary question which we desire to raise, that they could not appear in the District Court, and therefore, being in default, as provided by Rule 5, they are not entitled to service on the petition for certiorari.

NOTE: Atty. General Served.

Mr. Geo. E. Whitman joins in this brief, representing other assignees, as well as assignors of taxes illegally collected by the Commonwealth to the extent of approximately $147,000.00. These taxes have, by virtue of previous decisions of the Court of Appeals of Kentucky and of the Supreme Court of the United States, been held to be void, and on the trial of the merits, we will present the authorities and the facts herein showing their invalidity, and the efforts to evade this collection by a sharp political organization. By the established doctrine in Kentucky—all of these taxes may be collected in one suit—one for all.

After July 1st, 1938 no pleading could be filed, default was continuous of plaintiff.

BRIEF FOR GEORGE S. HOUSTON, and HARGIS LANGDON, TRUSTEES, and MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC., by HARVEY H. SMITH, THEIR SAID ATTORNEY, and by HARVEY H. SMITH, ATTORNEY IN FACT of the MORRIS WHOLESALE LIQUOR DISTRIBUTING CO., INC.

We herewith adopt the statement as made in the allegations in the Petition for Certiorari, for the purpose of giving a history of the case.

That on or about the 4th day of March 1940, the Honorable Respondent, Mac Swinford, the regular Judge of the United States District Court for the Eastern District of Kentucky, sitting in the trial of this cause, then pending in said district, entered an order in Cynthiana, Kentucky, not a place designated to hold Court, dismissing the counterclaim and cross-petition herein filed, with petitioners'

answer, in this cause, over the objection of its regular attorney, Harvey H. Smith, and who had not been deposed as such attorney, and who held a power of attorney in addition to his regular employment to do and perform certain things, which by agreement Morris Wholesale Liquor Distributing Co., Inc., agreed to, and the order of the respondent, Mac Swinford, was made in said court without notice to the said Harvey H. Smith, or said corporation, and without a proper hearing, as provided.

Illegal motion made by Ed. Morris — That thereafter your petitioners applied to the said United States District Court and demanded a full hearing according to law, and the opportunity of introducing testimony so as to determine the said motion made by Edward Morris, a stockholder and officer in said corporation, about which matters the court was entirely without jurisdiction. That at a later time, on or about the 29th day of April, 1940, the said court entered an order in said case, settling the issues and controversies therein, as he supposed, and against the interests of your petitioners, without a hearing, as the judge of said court, it being contended by the court at said time that Edward Morris had the right to make a motion to discharge the corporation attorney and dismiss said cross-petition outside of the manner provided by law ,and without factual or legal authority so to do, Kentucky law nullifying such motion as made, and U. S. decisions.

Thereafter, your petitioners filed their application in the Circuit Court of Appeals for the Sixth Circuit, praying said court that a mandamus be issued to the said Honorable Mac Swinford, directing

him, as the presiding Judge of said ccurt, to enter an order revoking said order of dismissal, and to grant the motion of your petitioners to make all the parties to the agreement, hereinafter alleged, parties plaintiff with the Morris Wholesale Liquor Distributing Co., Inc. That thereafter, the said Mac Swinford, Judge of said court, refused or failed, your petitioners are not able to determine which, to permit the filing of a notice of appeal to the United States Circuit Court of Appeals for the Sixth Circuit, which notice of appeal is legally necessary, and at the same time, they prayed the allowance of an appeal to said court from said order of March 4th, entered prior thereto, the said Respondent Mac Swinford refusing to allow said appeal because Harvey H. Smith was not attorney of record. That thereupon, your petitioners prayed the Honorable Circuit Court of Appeals for the Sixth Circuit to enter an order allowing mandamus against orders of the said Honorable Mac Swinford, as Judge of said court, and as the court, some of which orders were void, because not made by the court, but were made outside of the court, never entered by the Court, but at Cynthiana.

That the final order of the Judge, which was entered on March 4th, was entered without legal notice to Harvey H. Smith, attorney for Morris Wholesale Liquor Distributing Co., Inc., on hearing and the said Honorable Mac Swinford affirmed the agreement entered into between Edward Morris and James W. Martin and H. Clyde Reeves, the said Martin being the resigned officer, as Internal Revenue Commissioner of Kentucky, which resignation took effect from the 1st day of July, 1939. The said H. Clyde Reeves was his sucessor in office, but had

never qualified as by law provided, as Martin's successor as revived plaintiff on his relation as such officer to the Commonwealth of Kentucky in this cause; and at all times there was no plaintiff thereafter. Nor had the court jurisdiction because the Franklin Circuit Court had none, prior and Martin never had such anthority.

That the Honorable Circuit Court of Appeals refused to make any findings in the cause although motion was filed in the application for mandamus, and the motion to allow an appeal was refused by the said District Court, with no reasons or no findings in the case. That your petitioners therefore have no adequate remedy as they understand the rules of this court except to apply to the Supreme Court of the United States with directions through and by a writ of certiorari to the Sixth Circuit Court of Appeals in the first instance, to make findings or to adopt the findings from your petitioners or refuse to make such findings by proper orders of the court, and to make a finding in respect to their said refusal to grant your petitioners an appeal from the said orders of the said Honorable Mac Swinford. That the order of March 4, 1940, made by the said Honorable Mac Swinford, in the opinion of your petitioners, was not a final order such as they might appeal from, and the order made on March 4th, 1940, settling said cause of action involving more than $100,000, and which was made without the consent of your petitioners, without their knowledge, and without any authority upon the part of the Morris Wholesale Liquor Distributing Co., Inc., by Ed Morris, and without any jurisdiction in said court to

affirm or adopt said agreement as a judgment of the court.

That the pretended order of the court, which was the order of the Judge, was made in Cynthiana, on March 4, 1940. This order could not be made outside of the place designated by law to hold the court, and this alone, if there was no other reason, would invalidate it. This order reads as follows:

> "The defendant, Morris Wholesale Liquor Distributing Co., Inc., having appeared in open court through its Secretary, Edward Morris, and having advised the court that it does not desire to prosecute the counter-claim, cross petition and set off heretofore filed herein against the Commonwealth of Kentucky, et al, and having moved the court to dismiss its counter-claim, set off and cross petition, and the court being advised and having considered the same, it is ordered and adjudged that the counter-claim, cross-petition and set off heretofore filed herein against the Commonwealth of Kentucky, James W. Martin, Commissioner of Revenue, et al, be and the same is hereby ordered dismissed, with prejudice, at the cost of the defendant."

This order was made by the court without a hearing and made over the motion filed for a hearing by the Morris Wholesale Liquor Distributing Co., Inc., through Harvey H. Smith, with power of attorney, and for undisclosed parties in interest. A wire was sent to the court at the filing of the motion; and refusal to hear objections and produce evidence was a denial of the constitutional rights of your petitioners. Amendment 14 to the Constitution of the United States.

At the time this motion was made for a hearing, your petitioners had theretofore filed motion to dismiss, which had been denied. See Rule 81—(C) Controlling default. These motions were directed at the right of the plaintiff, Martin, to prosecute the action, and his standing default. Martin had then resigned, and under Section 780 U. S. C. A., and under Sections 501 to 511 of the Kentucky Code, Martin had no jurisdiction to prosecute the action, and the action ceased by operation of law. Without quoting these sections of the statute, or the Code, it will only be necessary to call the court's attention to the fact that the petitioning parties or plaintiffs in the cross-petition, had the right to proceed with the action because a cross-petition had been filed on December 11, 1939, to recover taxes and certain other expenses allowable by law.

Sections 20, 21, 22, 25, of the Kentucky Code provide that the right of the plaintiff or plaintiffs, or of any party wherein their rights have been assigned, the action may be continued in the name of the assignor, or the court may allow the person to whom the transfer or assignment is made to be substituted in the action. A petition was filed or rather presented, to the Clerk on the 14th day of February, 1940, by Langdon and Houston, and a motion made at said time that they be made parties to the action. These papers were held by the Clerk for a reason given by him that was not a legal reason. Under such circumstances, the transfer of right to choose in action was made during the pendency of an action; if the opposite party is notified of the transfer, and if any settlement is made between the litigating

parties and the adverse actual parties, a judgment of the court upon such an agreement is void.

Fordson Coal Co. vs. Jackson 7 (2) Fed. 117.

It will be seen, and it can be shown that a letter was addressed to J. J. Leary and to H. Clyde Reeves, then Internal Revenue Commissioner of the State of Kentucky. No settlement should be made under the circumstances of the pending action. Acknowledgement was received from the Internal Revenue Commissioner, but none from Leary. This was not important because Leary was not a legal attorney, nor a party to the action, but Reeves become liable for money accrued.

The judgment of April 29, shown in this record at page ——, and a petition at page 79, was confirmed by the Judge and H. Clyde Reeves as a party, as the Judge claimed he was. The judgment so entered under Section 25 of the Kentucky Code is void. And in Fordson Coal Co. vs. Jackson 7 (2) Fed. 117, Asher 249 Ky., Supra.

The motion dismissing the action on the 4th day of March, 1940, had no legal movant, as Edward Morris was not a party to the action, and even if he had the legal authority to represent the corporation the corporation could not make the motion, nor could any attorney make the motion, for the reason that under Section 571 of the Kentucky statutes, a corporation dissolved, as the court found it was dissolved, could not dismiss an action, nor could it make a motion, nor could it file a suit, nor could it file an answer, because, if there had been a hearing, as

demanded by Harvey H. Smith, it would have been proven, as a matter of law, on the Secretary of State's certification, that the corporation was not qualified to sue or defend a suit. The denial of this proof was a denial of the constitutional right of your petitioners. This matter was presented to the Circuit Court of Appeals and the Circuit Court of Appeals was asked, by motion, to make findings, and on the 15th day of May, 1940, refused a writ of mandamus. The judgment of the court being void on April 29, and on March 4, no appeal would lie to the Circuit Court of Appeals, and hence a mandamus was the proper remedy. The District Court had possession of the res, and in such a case, the right of the participating party in interest was absolute, and the trial court was without discretion to refuse the petition.

Swift vs. Black Panther Oil 244 Fed. 20.

In this cause, it will be shown, should the facts be presented, that 20 days after the first day of June, when the transcript was filed in the United States District Court for the Eastern District of Kentucky, the plaintiffs were in default, because it was their duty, when a motion was filed, to quash the service, and dismiss plaintiff's petition and dissolve the attachment to make reply to this motion. This motion was filed on August 29, and no objection made to its filing. The next day after it was filed, a motion to remand was filed, which was entirely out of time, and this motion was objected to by Morris Wholesale Liquor Distributing Co., Inc. A motion to remand must be seasonably filed, and this means that it should have been filed 21 days after the first day of

June, but it was not filed until approximately *three months* after filing the transcript. The court simply paid no attention to the rules of practice. Rule 81 C.

On January 25, 1939, a second motion was tendered on the ground that there was no service properly had, and that the petition did not state a cause of action.

The Court of Appeals of Kentucky has held that such a petition, which was brought by Clifford Smith and J. J. Leary, must set up their employment and prove as a fact that they had authority to appear in the case. Otherwise it would be implied by the Court from Section 112-5 that the Attorney General must appear.

Furthermore, the Acts of 1934 and 1936 both required the Auditor to bring this action. Sec. 10 page 35 petition.—Also 145—Stat.

The Court of Appeals has frequently decided that where a remedy is provided in an action, that remedy alone must be pursued. The Commonwealth was suing for the collection of taxes under the Act of 1936, and the Act of 1934, continued over, as they contended, under the Act of March 17, 1938.

Therefore, when they sought to collect these taxes, it was the duty of the Attorney General to bring the action, and the duty of the Attorney General to sue in the name of the Auditor.

NO FINDINGS

REFUSAL OF DISTRICT COURT AND CIRCUIT COURT, ARBITRARY DISPOSITION OF CASE: DENIAL OF EQUAL PROTECTION AND DUE PROCESS; 14th Amendment.

Motion for findings, and findings were proposed to both the District Court and Circuit Court after plain showing to the Circuit Court, that no fair trial or hearing could be had before the DISTRICT JUDGE, and that there could be no appeal from void judgment.

> "Special findings requested which raise legal propositions require ruling of the Court, and reversal follows such failure, either in the Circuit Court of Appeals or the District Court."
>
> Eastman Kodak Company vs. Gray 292 U. S. 337
>
> Lewellyn vs. Electric Company 275 U. S. 243
>
> Harley Co. vs. Malley 288 US 415
>
> General Motors vs. Swann 44 Fed. (2) 24
>
> Gerlach vs. C. R. & P. R. R. Co. 67 Fed. (2) 862
>
> Hawthorne vs. Bankers Life Ins. Co. 63 Fed. (2) 971 28 USCA 773
>
> Interstate Life vs. Klaber 50 Fed. (2) 154
>
> Merriam vs. Kissel 45 Fed. (2) 983
>
> American Surety vs. Cotton Co. 58 Fed. (2) 234

MANDATORY TO MAKE

Findings of FACT; must be supported by Evidence

USC 47:407

USC 15:522

USC 21:355 (h)

Rule 70-2

Humphrey vs. Helgerson 78 Fed. (2) 484

Parker vs. St. Sure 53 Fed. (2) 706

Edwards vs. Holland Banking Co. 75 Fed. (2) 706-708

Kelley vs. Central Hanover Bank, 85 Fed. (2) 61

Clark vs. Goldust Corp. 91 Fed. (2) 12

COURT COULD NOT CORRECT FINDING WITH AFTER ACQUIRED EVIDENCE.

Martin vs. Drexel Ice Cream Co. 80 Fed. (2) 768

Negative finding is insufficient.

Southwestern Bell Tel. Co. vs. San Antonio 75 Fed. (2) 880 (cited here, 295 US 754)

Separate findings must be made from conclusions of law.

Inter-state Circuit vs. US (304 US 55)

There were no findings here, as the Court will see:

The application of no other statute could be substitutted for this proceeding, Certiorari. Intention here was to nullify right of appeal.

Consequently, on September 29, the court rendered an opinion but refused to make any findings, and it is his contention that this order with-

out findings, *on the jurisdiction of the court* and the validity of the petition, was within the jurisdiction of the court, in spite of the fact that he had actually never received any evidence on the motion to quash the service in the case, or to dissolve the attachment. Therefore, on October 9, the defendants filed a motion to vacate his opinion or findings. An order was made allowing this motion to be filed. To safeguard the issue, one motion was filed with the Judge and one with the Clerk, which the record shows, and which is shown in the petition of Houston and Langdon. Drexel Case Supra.

On November 6, 1939, the court made another order refusing to vacate the findings, as he calls them, of September 29, 1939, claiming that he had made proper findings on September 29, 1939, wherein he denied all the pending motions, he says; which cannot be done without conclusions of law in any case, and if there is any evidence findings must be made by the court.

On December 11, 1939, motion was made by defendants to be allowed to file an answer. An order was made by the court, permitting the filing of the counter claim and action in cross-petition.

No reply was ever filed to this answer or counter claim, and all the facts were admitted properly pleaded in the counter claim. In this counter-claim, a demand was made for a jury to try the common law issue in the case, and also openly demanded in court, If there were any common law issues as set up in the counter claim, the jury could not be denied.

Rule 55, 7th Amendment (US).

Up to this time, there was no question concerning the Morris Wholesale Liquor Distributing Co's right to maintain the action.

Although the Morris Company had contributed money to carry out the agreement of May 15, 1938, and more than two years had elapsed, it made no effort to question the right to file the counter claim, and no evidence was ever presented to the court, as to Morris' right to file a motion. See the Record, page ——— and the petition shown at page 60. See petition page 70 for Morris motion showing he represented *only himself*.

However, this motion for intervening parties, and the motion to strike the motion of Edward Morris filed on February 9, was recited in the order of March 13, 1940, by the Judge, as being denied because he, the Judge, had rendered an order of dismissal of the counter claim on the 4th day of March, 1940. (On Ed Morris motion).

For these reasons, the court denied the motion to strike and the motion for judgment and the motion for summary judgment.

These pleadings were filed under Rule 5, which repuired the Judge to transmit them immediately to the office of the Clerk, and if filed with the clerk, "they must show service before filing or within a reasonable time thereafter." The clerk gave the excuse, if the facts had been determined, that he has the right to refuse the filing without service. But the court, on March 13, gave no such reason. He denied them because he had already entered a motion dismissing the counter claim.

Mr. Thomson makes an affidavit concerning the motion to strike and the motion for parties, as having been presented to the clerk on February 14, 1940. See Rule 77 *Controlling Clerk.*

But the same rule provides that no service need be made on the parties in default.

An examination of the petition of the plaintiffs in the Record, page 66, will plainly show that the plaintiff was not only in default, but was not even a party to the action, and the attorneys had no right to appear.

So that we summarize the foregoing by simply saying that the petition of the plaintiffs never stated a cause of action because it did not allege, among other things, that Clifford Smith had the right to bring this action in the name of James W. Martin.

When James W. Martin resigned from office, as shown by the defendants' motion, it was necessary then, under the Federal statute, and under the state statute, to revive the action. No other step could be taken. See notice to Court Record page —.

The filing of these motions and papers, disallowed, and no record having been made of them, we must rely upon our office file. The motion for leave to file a petition was attached to the intervention petition and the motion to strike, and the motion to strike was admittedly presented on the 14th day of February, 1940. And to this motion to strike was a motion for leave to file petition. The intervention petition was presented, but withdrawn and held until the motion to strike and the motion for leave to file were acted upon by the court.

The motion to strike and the motion for leave to file petition were never denied until the 13th day of March, 1940 although presented with the motion to strike on the 14th day of February, according to the affidavit of Mr. Thomson, record, page 53, Petition.

Clifford Smith Appeared — Not an Attorney under the law.

Clifford Smith appeared merely by some agreement with the Internal Revenue Commissioner, but the statute 112-5, nor the Constitution had been repealed. No emergency existed.

Commonwealth vs. Roberta Coal Co., 186 Ky. 409

Commonwealth vs. Louisville Property Co., 128 Ky. 790

Auditor must be a party—(Oliver) Louisville Realty Co., 156 Ky., 628. Sec. 145-159, Ky. Stat.

The settlement and judgment of April 29th, 1940, was of course void under both Federal and state laws, Code and Statutes. Rule 25 and section 780, Federal U. S. C. A., Title 28.

Kentucky Code 501 to 511. "If not revived cause will be stricken."

The judgment adjudicates claims against Martin when he was not a party, and Reeves when he was not a party, with attorneys acting who could not act. *We challenge the Respondents to show how Reeves got to be a party.*

It is like Ed Morris appearing as counsel for a corporation. See Rule 43 as to evidence.

How could the corporation appear on April 29th, when the court found, and the finding was the basis of a judgment dismissing counter claim by the corporation, March 4th, prior thereto.

"Corporation had finally been dissolved."
Sec. 571 Stat.

and Board of Directors, which is produced more than a month after judgment, not certified as required by law.

It will show the utter nonsense of attempting to practice a case by ordinary methods when the court and counsel totally ignore the rules and the law of both States and United States. This is similar to receiving the motion to strike, of defendants, the motion of Ed Morris, retaining it until a month later, and then in the meantime rendering a judgment on the motion filed by layman Morris. But the very brilliant episode is, when finding Morris must furnish proof, making in the open court order telling him that authority must be brought in—a resolution of a "dissolved" corporation by its defunct President

The motion of the defendants to strike, filed February 14th, meets this fate. It was on April 1st, 1940:

> "The motion to strike cannot be filed as a part of this record, and it is so ordered and adjudged, to all of which H. H. Smith objects and excepts.
>
> Mac Swinford".

See motion; Record page 3-6.

And then later the motion to strike, for summary judgment, and motion to dismiss, were all slaughtered for this reason.

"Motion to strike, motion for summary judgment, motion to dismiss because the court had entered an order March 4th, dismissing counter claim."

In other words, you may be an attorney, and except to a ruling, and if a counter claim is dismissed, that's the end of your legal career in that case, and if your corporation has an ubiquitous Secretary, he may appear as counsellor extraordinary after hearing, and without consent of counsel, and with no evidence — brilliant strategy we allow: if the court approves, *by parties not in the case, and by counsel not in the case.*

"If revivor is not made within time prescribed by Code, counsel and parties disappear by operation of law."

Sackett vs. Grinstead, 176 Ky. 91.
Kentucky Code 501 to 511
Asher vs. Fordson Coal, 249 Ky. 487
Fordson vs. Jackson 7 Fed. (2) 117.

THE EVIDENCE RECEIVED BY THE COURT AFTER JUDGMENT

The judgment of dismissal, which is called a judgment by the court, was presented to the Judge by Rosenstein, an attorney foreign to the case, signed at Cynthiana, a place where court may not be held, proves conclusively that the court made no findings, as above shown. Drexel Case Supra.

EXHIBIT A — March 4, 1940

"The defendant, Morris Wholesale Liquor Distributing Co., having appeared in open court through its Secretary, Edward Morris, and having advised the court that it does not desire to

prosecute the counter-claim, cross-petition and set off heretofore filed herein against the Commonwealth of Kentucky, et al, and having moved the court to dismiss its counter-claim, set off and cross-petition, and the court being advised and having considered the same, it is ordered and adjudged that the counter-claim, cross-petition and set off heretofore filed herein against the Commonwealth of Kentucky, James W. Martin, Commissioner of Revenue, H. Clyde Reeves, Commissioner of Revenue, et al, be and the same is hereby ordered dismissed, with prejudice, at the cost of the Defendant."

The only way petitioners would have of proving this order was made at Cynthiana would be to have a hearing as demanded, and show it by the court's letter and the Clerk's letter to Harvey H. Smith.

This would have come up on the motion to strike, which was pending from and after the 14th of February. We quote from the affidavit of Anthony Thomson at page 53, of applicant's petition:

"That on the 13th of February, 1940, he received from Judge Harvey H. Smith a motion to strike the motion of Edward Morris to dismiss the counter claim and answer heretofore filed in the case of J. W. Martin, et al, plaintiffs, vs. Morris Wholesale Liquor Distributing Company, Inc., defendants, which was then pending in the Eastern District of Kentucky at Catlettsburg. That said affiant took said motion (and this motion for parties) to the United States Clerk at Lexington, where he had received the same and did offer to file with said Clerk the motion above mentioned. That under rule 5-A of the New Rules of Civil Procedure, the Clerk refused to accept and file said motion until copies had been delivered counsel for the other parties or notice of the filing accepted by respective coun-

sel for litigants." Rule 5—"Service by mailing is complete." Leaving it with Clerk of the Court."

In the first place, these gentlemen were not counsel in the case. In the second place, the rules provide that no pleadings need be served on a party in default. In the third place, the rules provide that service may be had "in a reasonable time after filing," if rules 4 and 5 are read. The motion presented at the same time is Exhibit B, which reads:

> "Comes now the Morris Wholesale Liquor Distributing Co., Inc., a corporation, by Harvey H. Smith, its counsel, and moves the Court to allow the filing of the intervention petition of George S. Houston, Blue Grass Liquor Company, Inc., Hargis Langdon, et al.
>
> The grounds of this petition are that they are actual parties, to the controversy now between the Commonwealth of Kentucky, on relation of James W. Martin, and that it is necessary to protect their interests herein, in view of the conduct of Edward Morris an officer and stockholder in the Morris Wholesale Liquor Distributing Co., Inc.
>
> Respectfully submitted,
>
> Harvey H. Smith, Attorney for Geo. S. Houston,
>
> Hargis Langdon, Harvey H. Smith, et al."

The Court then, on April 9, 1940, made the ruling found at page 52 of the petition.

> "Motion to Strike, the motion of Edward Morris to dismiss the Counter-Claim and answer heretofore filed in the above entitled cause, motion for judgment, motion for summary judgment, this cause having been by order of the court dismissed on the 4th day of March, 1940, it is ordered that the motion to file motion to

strike, motion for judgment, and motion for summary judgment, is hereby overruled.

Signed: Mac Swinford, Judge.

Certified: A. B. Rouse, Clerk, March 13, 1940."

Served and Filed Feb. 14, *Under Rule* 5.

The remarkable motion of Edward Morris is recited by the court in his order at page 56, of petition on which he founded this order at Cynthiana:

> "The *request* was made by the said Edward Edward Morris in the form of a motion that the court dismiss the answer and counter claim filed herein as of December 11, 1939."
>
> *Not sworn to — Not filed by corporation.*

Now, of course, Edward Morris could make no such motion. He is not an attorney and the corporation had assigned its rights to trustees, as they might accrue in said cause, and furthermore, the corporation could file no such motion because it had failed to appoint a service agent as required by law, and the Court of Appeals in the Oliver vs. City of Louisville 161 S. W. 570 Case; and Druin vs. Chatterson, 143 S. W. 6, recited herein, held that it could neither answer or plead in a cause under such circumstances, nor could the court have any jurisdiction to grant relief. (Sec. 571, Ky. Stat)

The court denied the motion for findings filed in this case upon the sole ground that there was no evidence and because H. H. Smith was not attorney.

In proof of the fact that the court did receive evidence after the judgment or order of March 4, we recite Exhibit F:

"This day came James W. Chapman, attorney for the Morris Wholesale Liquor Distributing Co., Inc., and in compliance with the order heretofore entered in the above styled case offered for filing a Resolution signed by Irving Olin, Chairman of the Board of the Morris Wholesale Liquor Distributing Company, approving the action of Eddie Morris, Secretary-Treasurer of the Company, in dismissing the answer and counter-claim of the Company heretofore filed in this action, and agreeing to the entry of the agreed judgment in the above styled action, the resolution being sworn to by Irving Olin before Samuel Morris, Notary Public, Boyd County, Kentucky, the Court being advised, it is ordered that the Resolution be, and it is now filed and noted of record. (41 days after Judgment).

MAC SWINFORD, Judge.

Certified: A. B. Rouse, Clerk."

This is evidence, April 15, 1940.

NO EVIDENCE RULE 43

Thus there were findings, but based on what? Where is there in this case a *first affirmation?* Where did he get the evidence to make a finding of fact, that H. H. Smith did not represent the corporation?

EVIDENCE MUST BE SWORN TO IN KENTUCKY (Ky. Code) Rule 43 (US)

Mr. Smith, Feb. 9th, 1940: "I demand this witness be sworn." The court refused.

"Any motion disputed must be sworn to or the court will strike it."

Oral objection was made to appearance of attorneys at the same time.

Clifton vs. Toombs, 21 Fed. (2) 698, the Sixth Circuit, decided that this is a power statute and the court has no right to hear challenged counsel except in defense of their right to appear. Their petition must state their right to appear, since they do not sign as Attorney General, which is notice to the world, they have no right to represent the state. The District Court refused to rule, and the Circuit Court of Appeals refused to make findings.

Such is the law of Kentucky.

Your petitioners were vigilant in calling the court's attention to what were their legal rights. They filed a supplemental petition, to which was annexed exhibits, while the court was attempting to act during the pendency in the mandamus in the Circuit Court of Appeals, which, if not illegal, is very unethical. We quote this petition filed April 8, 1940, in the *Circuit Court of Appeals for the Sixth Circuit*: See Rule 5 (C).

"TO THE HONORABLE JUSTICES OF THE CIRCUIT COURT OF APPEALS:

Filed April 8, 1940, John W. Menzies, Clerk of Circuit Court of Appeals.

Since the filing of the previous petitions for the Writ of Mandamus the Honorable Respondent called a Special Court in the City of Covington, Kentucky, and there permitted, J. W. Chapman, alleged Attorney for the Morris Wholesale Liquor Distributing Company, and after the Judgment of March 4th, 1940, dismissing the counter-claim, and he was asked to state in open court whether he authorized Edward Morris to use his name as Attorney, and he was authorized

to furnish the Court a resolution of the Corporation, authorizing his employment, and the discharge of Harvey H. Smith. Harvey H. Smith objected to his making a statement, and objected to presenting a resolution after judgment had been rendered in the case, and after refusal by the Court to Harvey H. Smith to examine both Morris and Chapman, in respect to what was done and because no copy of the resolution was served on Harvey H. Smith, and no witnesses sworn, and no oportunity given Harvey H. Smith to cross-examine the witnesses; and because the petition to substitute interested parties had been refused by the Court of filing, and because said action of the court was without jurisdiction, and prejudicial to such petitioning parties and Harvey H. Smith, having no chance to cross-examine the witnesses, all of which action denied to Harvey H. Smith and said petitioners due process of Law, contrary to the 14th Amendment of the Constitution of the United States. The said Court having been called April 1st, 1940, 7:30 P. M.

Respectfully submitted,

HARVEY H. SMITH,

Counsel."

Motion for leave to file intervention petition is as follows: See Rule 5 (C) Matter of Right.

"Come the Morris Wholesale Liquor Distributing Company, Inc., a corporation, by Harey H. Smith, its counsel, and move the court to to allow the filing of an intervention petition of George S. Houston, Blue Grass Liquor Co., Inc., Hargis Langdon, et al. The grounds of this petition are that they are actual parties to the controversy now between the Commonwealth of Kentucky, on relation of James W. Martin, and that it is necessary to protect their interests here in view of the conduct of Edward Morris,

an officer and stockholder in the Morris Wholesale Liquor Distributing Co., Inc.

Respectfully submitted,

HARVEY H. SMITH, GEORGE S. HOUSTON,
HARGIS LANGDON, ET AL."

The intervention petition and petition for substitution of parties-trustees, under the Code in Kentucky and the Federal Rules, is entitled: "Intervention petition of George S. Houston, Blue Grass Liquor Co., Inc., Hargis Langdon, et al." This petition was presented to Anthony Thomson on the 13th, as certified in his sworn affidavit. This petition and the motion were both over-ruled by the court, March 13, after he had rendered judgment dismissing the counter clain. A summons must be issued under (C) Rule and Kentucky Code 20 to 25.

The motion to strike, which precipitated the entire jurisdiction of the court, and the right of Edward Morris to file the motion, was presented and received by the Clerk on the 14th of Febraury, 1940, prior to any judgment. The Clerk's contention was that it had to be served before it could be filed, but a reading of Rule 5 will show that it may be "served at any reasonable time thereafter." As a matter fact, it had been served on February 2nd, by Frank M. Dailey, on counsel for James W. Martin. We merely recite the caption: See Rule 19.23.

"Come now defendant, Morris Wholesale Liquor Distributing Co., Inc., by Harvey H. Smith, and moves to strike the recorded judgment dismissing the counter-claim of the Morris Wholesale Liquor Distributing Co., Inc., and as grounds therefore allege:

SUMMARY

a. That the order could only be entered in open court and was entered at Cynthiana.

b. That the order was entered without evidence or without findings, and entered by the Judge and not by the Court. That the order was based upon the motion of Edward Morris, a stranger to the record.

c. That Edward Morris was not sworn according to the laws of Kentucky, and could not be permitted to testify in open court without being sworn. That the denial on the demand of Harvey H. Smith to swear said Morris and hold a hearing was a denial of the constitutional rights to show the court that Morris had no authority.

d. That the Morris Company could not dismiss this action without the consent of Harvey H. Smith, et al.

e. That on the admission of the court that there is no evidence, no judgment or order could be entered. That when said order was filed, there was pending a motion for judgment presented to the court and a motion for summary judgment. These motions were filed on February 3 and February 13, prior to the entry of the order of March 4, and must be determined before that order could be entered. That the associates of the Morris Company, as parties in interest, had the absolute right to file their petition of intervention as soon as they learned the Morris Company, or Edward Morris, had attempted to violate the contract of May 15, 1938. That the pro confesso judgment was presented to the Clerk on January 22, but was not filed until February 9th. That this judgment must be granted in view of the default of plaintiffs. That James W. Martin had no capacity to file any pleading in the case."

THE FINDINGS Rule 52

The findings were overruled by the court or denied filing on March 13th, 1940. That there are 27 grounds of these findings, among which are that Leary and Rosenstein represented no party in this action. That they are not members of the Attorney General's staff, and that the Attorney General alone could bring and defend this action. That under Section 780 of the U. S. C. A., Code of the United States, James W. Martin and said attorneys had ceased to be parties in the action. (Ky. Code 501 to 511).

That the conclusions of law, in said findings, of the number of 10, were refused filing by the court.

SUMMARY

That the Morris Company was entitled to judgment on its motions. That the motion to dismiss attachment must be sustained. That the Franklin Circuit Court, where the suit originated, had no jurisdiction. The United States District Court had never determined its jurisdiction. That the attorneys, Leary and Rosenstein, were barred from participating in the cause. That James W. Martin had ceased to be a party on his resignation from office July 1st. That Reeves, his successor, had never qualified as a party according to the United States Code, and the Code of Kentucky. That the taxes were invalid which were sued out and that the Acts under which they were sued required the Auditor to bring the action. That the Acts of 1934, 1936, and 1938 were void and, as they were attempted to be imposed, denied your petitioners their rights under the 14th Amendment and under Amendements 4, 5 and 7 of the Constitution of the United States.

That the order of the said Mac Swinford, on April 1st, 1940, as made thereafter, denying the motion to strike, should have been ruled upon and filed on February 14, 1940. That the court had no jurisdiction to make any order whatsoever after default of the parties or after the resignation of James W. Martin. Summary Judgment therefore was good February 9th, 1940. Rule 56 (C).

That the Acts complained of and which burden your petitioners in the collection of import taxes and consumers' taxes were all unconstitutional and imposed a burden without law on your petitioners.

a. Kentucky Alcohol Control Act, and Whiskey Tax Law, of the State of Kentucky, effective March 17, 1934.

b. The Kentucky Whiskey Tax Act of April 30, 1936.

c. Alcoholic Beverage Control Law of 1938, contains 27 sections which the Court of Appeals of Kentucky, had decided theretofore, were unconstitutional upon one ground and another. That without these provisions the Act would be unenforceable and therefore the entire act is ununconstitutional — all acts.

That each of said Acts violate Article 1, Section 8, of the Constitution of the United States. That each of said Acts violate Amendment 7 and 4 and 5 of the Constitution of the United States and Amendment 14 of the Constitution of the United States. That each of said acts violate the Interstate Commerce Act known as the Carmack Amendment, The Repeal and Enforcement Act of August 27, 1935, and the Bill of Lading Act, enacted in 1916, as amended in 1930, the Motor Carrier Act of 1935, enacted by the

Congress of the United States. That these acts, as they were enforced against your petitioners, deprived them of their property without due process, denied equal protection and impaired their contract. A full and complete argument on these issues will be presented by a special brief, when this court shall determine the questions which we think will dispose of the case without their consideration.

On April 1st, 1940, the Court made his second order, concerning the motion to strike in words as follows:

> "The Clerk is directed to make the motion to strike tendered but not filed, and placed with the record.
>
> Signed: MAC SWINFORD, Judge
>
> April 1, 1940
>
> Certified:
>
> Signed: A. B. ROUSE, Clerk".

See Rule 77 (A, B, C) The Judge seemed to fear the motion—he struck at it three times.

Thereafter, H. H. Smith filed motion for permit to file bill of exceptions. This was denied by the court, although a bill of exceptions was not presented with the motion. He also attached to this motion authorities in 31 states showing that inasmuch as Morris was not authorized by the corporation, and there was no testimony to support the Morris motion, and it was not sworn to, and that Morris had stated he was insolvent, and had been dissolved, that the action must be continued in the name of the Morris Company to secure the fees of Harvey H. Smith. Under the case of Erie R. R. vs. Thompson, 304 U. S.,

the laws of Kentucky were binding on this court at this time, in respect to attorneys' fees.

We pursue the record here no further except to say, that if the court desires to examine the entire record and finds it necessary to sustain the petition for the writ, we will present such records as are necessary, but in our view of the case, the judgment of the court on March 4th, 1940, was void, for it is conceded that J. W. Martin resigned his office July 1st, 1939, and it is conceded by the record recited in the petition that the Commonwealth of Kentucky and J. W. Martin were always in default, and it will be conceded that Leary, Clifford Smith, and Rosenstein are not attorney generals of Kentucky; and it is the law of this court, and the Sixth Circuit, and the Commonwealth of Kentucky, that no attorney can appear in a case and make motions when his client is demitted from the case by operation of law, Kentucky Code 501 to 511. The judgment of April 29th, entered at Lexington, Kentucky, and not at Catlettsburg, Kentucky, was a void judgment for the many reasons cited in this brief. First, because there were no parties plaintiff; second, H. H. Smith was still attorney for the Morris Wholesale Liquor Distributing Co., Inc., and had never been demitted in the case by order of the court, and that the attorneys who appeared could not appear. That Reeves had never been made a party successor to J. W. Martin, and J. W. Martin had been out of office for more than six month at that time. That where a settlement is made when intervening parties have been denied appearance in the case, judgment is void

under the Kentucky Code, 501 to 511, and under the Code of the United States, U. S. C. A., Sec. 780, Rule 25.

Roberts vs. Lowe — 236 Fed. 604.

That where the judgment of the court is based upon evidence received by the court after the entry of the order of March 4th, 1940, the judgment is void. That a judgment in a pending action in which there are common law issues, must be tried in the district, designated by the statutes, which is Catlettsburg, Kentucky. That where a corporation has failed to designate its service agent under the Kentucky statute, as decided in the Oliver case, Supra, the judgment is void. The judgment is void upon other grounds not necessary to present here.

If the petition for Certiorari by any chance is denied, this court could make some proper order vacating the judgments herein referred to, and in this order designate a re-trial, and suggest that a judge from out of the district should be brought in to try the cause, on a proper petition filed by Harvey H. Smith, George S. Houston, Hargis Langdon and Morris Wholesale Liquor Distributing Co., Inc., by H. H. Smith.

Respectfully submitted,

HARVEY H. SMITH,

GEORGE E. WHITMAN.

SPECIAL BRIEF OF HARVEY H. SMITH, FOR HIMSELF, RESTATING HIS POSITION.

(1) Harvey H. Smith had been employed to defend the criminal action of seizure of sixty cases, shipped in inter-state commerce by the Morris Wholesale Liquor Distributing Company, Incorporated, on March 24, 1924. He defended a civil action and a criminal action prior to May 15, 1938. A proceeding being filed about this time to cancel the permit of the corporation as wholesaler, he also defended that action.

On or about May 15, 1938, contract was entered into between the Morris Wholesale Liquor Distributing Company, Incorporated, and numerous other wholesalers and rectifiers to collect from the Commonwealth of Kentucky certain import taxes, and consumers taxes. A contract was entered into, whereby the interest of each of these parties was assigned to two trustees, Hargis Langdon and George S. Houston, which assignments included the interests of the Morris Wholesale Liquor Distributing Company, Incorporated, and it was agreed that the action should be prosecuted in the name of the Morris Wholesale Liquor Distributing Company, Inc., by cross-petition. A power of attorney was executed to Harvey H. Smith by the Morris Wholesale Liquor Distributing Company, Inc., and certain other parties to carry out the terms of this agreement and money paid.

(2) Thereafter, the politicians of the Capitol of Kentucky secured possession of Ed Morris, Secretary of the Morris Wholesale Liquor Distributing Company, Inc., and promised him certain exporting rights, conditioned on the passage of a bill through the

legislature of Kentucky. This bill was passed but vetoed by the Governor of the State, but before its veto, Morris had entered into an agreement with these politicians that he would dismiss the cross-petition and counter-claim filed in this action. This agreement was proposed to Harvey H. Smith, the counsel of the Corporation, but he refused it, and insisted that if the Corporation could breach its contract, that the other interested parties would have to be substituted, or the fact made known to the Court. Thereupon Morris appeared personally in the court at Lexington, Ky. — A place other than where the action was pending.

There is but one question that needs be argued, and which, by all precedent disposes of this case.

(3) The order of this Court, clearly, must be, on the record:— Return of the *cause,* and an order to dismiss the *action* of the plaintiff, vacating all orders made after August 29, 1938, except that motion of the defendant for judgment pro-confesso on the cross petition or the Counter Claim Petition of the Morris Wholesale Liquor Distributing Company, Incorporated.

The action and order for costs of this application, proceeding in that name, for the benefit of parties who might be substituted, and parties, who, as matter of right might become parties to establish their right to participate in the judgment had against the Commonwealth, under Kentucky Code for taxes due and owing.

(4) The amount of proof necessary to show the total taxes due in this action may be taken, but no controverted question can be litigated. An order de-

mitting any interest which Ed Morris might have, and the assets disposed of by the void judgment of April 29, 1940, should be returned to the possession of the court, or their actual value; and summary judgment after proof of the services of counsel since the 29th day of August, 1938, and the order should include the substance right of a trial before a Judge out side of the district, for reasons shown by the record and for reasons that could be shown on a motion to disqualify.

(5) The questions are argued thru, but the determining question is the fact that under both Federal and Kentucky Statutes, the court had no jurisdiction to enter any order after August 29, 1938, because the action abated as to the plaintiffs on that date, and no revivor can be had now over the objection of the corporation—that corporation having assigned its interest in the subject matter of litigation, and plaintiff having abated, with their action July 1, 1939. Sub-questions are:

(6) Judgment of April 29th is void.

Order of March 4th is void.

Motion-Right of petitioners to be joined as parties plaintiff on cross-petition and counter claim should be sustained.

Judgment for costs and for assets, returned with allowed attorneys fees up to that time.

Motion filed, August 2, 1938, and Motion filed August 29, 1938, must be sustained.

Motion for judgment of December 11th, should be sustained.

Finding should be made that no proper parties or attorneys had ever appeared, so as to settle that issue of law. Default, 81-C Rule.

The attorneys fees and costs of appeal and application for mandamus in the Circuit Court of Appeals, and the defense in the District Court after default of the plaintiff, and certainly after dismissal of the plaintiff's action by operation of the law, July 1st, 1939, should be adjudicated and allowed by this Court. $1,000, for appeal, $1,000 for, appearance in the District Court and the Circuit Court of Appeals, and the costs of printing briefs.

(7) Under the Federal Statute the manner of revivorship is specified under Rule 25 which requires the service of process, and Section 780 Title 28 USC.

> "When an officer resigns or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within six months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it."

Thus it appeared that the kinds of public officers included are those of any county, city or governmental agency. Section 780 of the Statute, refers to *the present or future discharge* of official duties. The Statute applies the rule to an action, suit or other proceeding, while the Rule applies to an officer when he is a party to an action.

It is very plain, however, that the substance of the rule is the same as that of the State of Kentucky except that the time is different. It was formerly twelve months in the Federal Statute but has been reduced to six months. It has been universally held by both the Federal and Kentucky Courts that an order of substitution must be made after due notice to the party to be substituted, and to the

opposing or adverse parties to the person making the application. The action does not abate as a *cause of action* but it does abate insofar as it relates to *the pending action.*

Thomas B. Bishop Company vs. Santa Barbara County 96 F. (2) 198, 199.

In US vs. Cummings 85 F. (2) 273, it was held that if the order of substitution is not made then there is no revivorship, such is the law of Kentucky.

The statute applies to both trial and appellate courts, while the rule applies to the United State District Court.

Ex parte La Prade 289 US page 459 and 489.

Summons must be served in each case under each statute.

Barth vs. Barth 102 Ky. 56—Code 501 to 511. In that case it is said:

> "Within thirty days after service, if six months has expired, petition may be filed, but must be filed within twelve months."
> Louisville vs. US 97 SW 1096.
>
> "Unless substitution is made, the court loses jurisdiction."
>
> Asher vs. Fordson Coal Co. 249 Ky. 498
>
> The Black-Clausen vs. Robertson 71 F. (2) 536.
>
> Martin vs. Coe 83 F. (2) 606.
>
> Sackett vs. Grinstead 176 Ky. 91.
>
> Baker vs. Davis 221 Ky. 527.

In Martin case the court said:

> "No motion was made under Section 11 of

the Act of February 13, 1925, Chapter 229, 43 State-936-941, 28 USCA 780, asking the court to permit the cause of action to be continued and maintained by or against the successor in office of such officer, and that the six month period, within which such a motion could have been made had expired, the court now vacated the judgments entered in the District Court and in the Circuit Court of Appeals and remands the cause to the District Court with directions to dismiss the action or cause as abated."

An order to revive cannot be made without consent of the defendant except by petition and summons.

509 Ky. Code and 505 to 511.

Petition must be filed stating facts necessary to authorize revivor with a prayer therefor upon which summons may be issued and served.

Acts of 1894 C-72, Page, 172 (US).

Hall vs. Sipes 10, Ky. Reporter 885.
502 Kentucky Code.

If not revived by consent, the order of the court shall be served as a summons on the adverse party to the one making the motion.

Baker vs. Davis 221 Ky. 525.

Revivor is void under the Civil Code of Practice, Section 502 to 511 if not revived in the manner provided; and shall be stricken from the docket on the order of the court.

Costs shall be allowed including attorneys fees.

Hollen vs. Administrator 259 Ky. 142.

Thus it is plain that the judgment or order,

whatever it might be in this cause after July 1st, 1939 was void, unless it had been an order of the Court rendered exparte on the pro-confesso petition and motion for judgment.

NEITHER MARTIN NOR REEVES COULD APPEAR AS A PARTY IN THE CASE, AS SHOWN BY THE ABOVE AUTHORITIES.

Neither Clifford Smith nor J. J. Leary nor any other person could appear in the case as attorneys, and never at any time under 112-5 Ky. Statute.

TRUSTEES

"If the petitioning parties who were contracted with are interfered with by the decree of the court, and the contract was previously made, these parties have a right to intervene and the judgment has been presented after the intervention or substitution has been applied for, the judgment is void."

French vs. Capen 105 US Page 509.

US vs. Ladley 51 F. (2) 757

US vs. California Canaries 279 US 556

Leary vs. Administrators 224 US 567

Sections 501 to 511 Ky. Code.

And the judgment is void for want of parties. (No revivors).

Black vs Robertson Supra.

"The motion must be filed within six months, we see no escape from the conclusion that the judgment is void, and the action must be dismissed."

LeCrone vs. McAdoo 253 US 217

Clauson vs. Curran 276 US 590

Fix vs. Philadelphia Barge Co. 290 US 530.

"We therefore remand the case to the court below with directions to dismiss the bill. Remanded with directions to dismiss."

(9) ATTORNEY GENERAL MUST BE A PARTY.

Kentucky Statute 112-5.

Com. vs. Roberta Coal Co. 186 Ky. 409

McAlexander vs. Wright 3 AKM 189

Com. vs. Louisville Property Co. 128 Ky. 790

(Auditor) Louisville Realty Co. 156 Ky. 628.

The following brilliant expurgation of the mental field within legal lore is no judgment, and affects not the Commonwealth nor any other person. It is as follows:

JUDGMENT — APRIL 29th

"This judgment is to be treated as a full and complete settlement and adjustment of all claims asserted by the plaintiff against the defendant herein and of any and all claims that the defendant has asserted or may have against the plaintiff and James W. Martin, (*not a party,*) and H. Clyde Reeves." (Not a party).

MAC SWINFORD.

In the first place Martin was out, and Reeves was not in. In the second place the suit was by the Commonwealth of Kentucky on relation of Martin, and if the judgment was not in favor of the Commonwealth then there could be no judgment. If the cross-petition had been dismissed against Martin, of course the claim did not exist as against him, and

not being tried on the merits could not of course be adjudicated as an estoppel against future action.

(10) *The question of intervention is not important in view of other questions,* although this question could become important, and if the court reaches the position where it desires to examine the law, we suggest Swift vs. Black Panther Co. 244 Fed. 20, and the copious authorities cited there. This situation however is controlled by the Kentucky Code, Section 20 to 28. It is enough to say that under the terms of the contract made here on May 15, 1938, the right of substitution would control in respect to all assignments that have been made. *The supposed order dismissing H. H. Smith as attorney.* —Considered here.

(11) There never was an order made by the court dismissing H. H. Smith as attorney for the Morris Wholesale Liquor Distributing Company, Inc. This order could only be made at the hearing of testimony, and the Court refused to hear any testimony on the subject, consequently H. H. Smith was never dismissed from the suit.

Morris had no power to do so, and if the Corporation had authorized him to do so before the entry of dismissal this hearing would have precipitated the contract made by the Company and would have, when exposed, prevented any such action.

Besides, the assignment of the interests of the company to the trustees, made the corporation merely a nominal party, the denial by the court, of such a hearing, on a motion to strike his name, and the action of the court in respect to said motion would have

prevented the court where evidence was produced from doing anything other than to sustain a motion to strike.

April 1st *order of the court proves this*:

> "The defendant through the said Edward Morris stated in open Court, that the Morris Wholesale Liquor Distributing Co., Inc., was no longer an operating Company, and HAD FINALLY BEEN DISSOLVED. The request was made in the form of a motion that the court dismiss the answer and counter claim filed herein as of December 11, 1939."
>
> In Kentucky a corporation cannot act after dissolution.

If the corporation had been *dissolved, how* could it make such a motion? If it had not been dissolved how could Edward Morris make the motion, being a layman and his client, a corporation. There was no showing that Morris had any authority.

The court refused to swear him or hear any testimony, for the court says that H. H. Smith, attorney without proof, of record is no longer an attorney for the company. There is not a scintilla of proof in the record to support such a statement made by the court.

How can any court deny the appearance of an attorney until he makes a finding, based on evidence, that for some lawful reason the attorney is "fired" by the corporation. What evidence is here to show that Smith had ceased to be attorney, for the court refused to make a finding himself, and refused to state why he refused findings of Morris Wholesale Liquor Distributing Co., Inc. a dissolved corporation.

How could the court know it was *dissolved,* except by hearsay, out of the record? *He refused to allow the filing of the motion to strike.* Where is the authority in law or rules for such refusal, which would and did promptly raise the question of whether there was any authority anywhere for the Morris appearance.

(12) February 10, 1940, Harvey H. Smith filed motion for findings, under the rule, allowing three days for transporting in the mail the Clerk should have filed it the 13th of February, 1940. If so he should have presented it to the Judge, no doubt he did, and in this motion page 60-61 of the petition (Harvey H. Smith was still an attorney of record).

We quote:

MOTION AND TELEGRAM:

> "That the court set this cause down for hearing for the purpose of introducing evidence on the right and claim of Edward Morris to represent the Morris Wholesale Liquor Distributing Company, Inc., and discharge Harvey H. Smith, as attorney, and the purpose of showing collusion, etc." Record pg. ———.

Also on March 4th 10 A. M. wire to Judge.

> "Request no action in Morris case until set down for hearing." H. H. Smith.

All of this before order of dismissal.

If H. H. Smith was not attorney of record, the law gives Hargis Langdon and George S. Houston the right to file a motion or petition as intervening parties, they being citizens; expressly so, under federal and state rules.

But let us see how fair the court was:

So we have an order April 1st, 1940. We quote:

> "The motion to strike cannot be filed as a part of this record and it is so ordered and adjudged, to all of which H. H. Smith objects and excepts." Record page ———.

Then we have Mr. Thompson's affidavit, sworn to on the 21st day of February, 1940, relative to the motion to strike-as follows:

> "That on the 13th day of February, 1940, he received from Judge Harvey H. Smith a motion to strike, the motion of Edward Morris to dismiss the counter claim and answer heretofore filed etc. That said affiant took said motion to the United States Clerk at Lexington, where he had received the same, and did offer to file with said Clerk the motion above mentioned." Letter says he filed, Clerk admits he did.

So the Clerk had said motion all of this time. At this time the court had made no order, but there should have been before him a motion for a hearing and findings, and to hear evidence, unless lost in the mail. Rule 77—A, B, C.

See pages 52-53 of petition. But on March 13, 1940 the Court took another court order or judicial order, we do not know which, which was 17 days prior to the April 1st order. See Rule 5 (d-e).

> "Motion to Strike, see Page 52 of Petition, where motion to dismiss and motion for sum-

mary Judgment and motion to strike were denied because the court had entered an order March 4th dismissing counter claim."

Hear him:

"This CAUSE having been dismissed by order of the Court on March 4th, 1940." Record Page ————.

So the reason that day was different from April 1st—the April 1st reason was because H. H. Smith was no longer attorney of record, and the March 4th, 1940 order imperiled the court's jurisdiction, the judge concluded, because dismissed counter claim died.

None of these orders had force, and generally were not true, let us see if the record bears out the statement.

Motion on February 9th, for want of proper parties, was filed that day, and was before the Court. Martin had been demoted, Reeves had never been qualified, and under Rule 25, Section 780 USCA and the Code of Kentucky they were not parties.—501 to 511.

Filed and entered April 29th, 1940. Spurious Judgment, approved by the Judge.

Mr. H. Clyde Reeves, approved of the entry, Mr. Clifford Smith, (not an attorney general,) Mr. J. J. Leary, Mr. Samuel Rosenstein, but their appearance the record recites is on the relation of J. W. Martin for the Commonwealth. So the cause was still glittering in the judicial sunshine on April 29th, and was not dismissed—(This cause April 1st, Smith did appear).

(13) The court denies the Findings, in an order and letter, because there was no evidence. On Page 64 C. Pet. on April 16, before April 29, final order and

judgment, the Morris Wholesale Liquor Distributing Company, Inc., and H. H. Smith made a motion for a Bill of Exceptions to preserve the record, and George S. Houston and Hargis Langdon join, on the theory that the filing of their motion and attached petition for parties and summons, gave them the right. Motion for bill filed Page 64 of the petition.

It says:

> "Moves the court for an order to settle the Bill of Exceptions." Mailed April 16th, 1940—Over-ruled on the 17th.
>
> "This day came Harvey H. Smith and offered for filing motion to file bill of exception, and BILL OF EXCEPTIONS. Denied because Harvey H. Smith is no longer attorney of RECORD."

Thus the court makes no order striking the name of H. H. Smith but finds he has done so in substance before.

Smith, was attorney for defendant, when the petition was filed, and if the statement of the court is well founded, an exception being allowed to him, he had a right to have a BILL OF EXCEPTIONS allowed where there is any evidence, and surely, conclusions of law.

Inasmuch as he was not "fired," by the court, as he says, (the judge), then of course H. H. Smith had a right to appeal from the final judgment on April 29th, 1940, from that firing, and if there was the slightest evidence to support the court, Smith had a right to such a BILL, but he denied filing of notice of appeal. But as a matter of fact no such

Bill was presented, but a motion for one, just to test out the malignant feeling of the court, to see to what extremes he would go and he denied filing a bill of exceptions never presented.

(14) On April 15, 1940, the court allowed evidence, as shown at 54—the petition, being resolutions from the President of the DISSOLVED CORPORATION. Surely he calls these resolutions offered by Morris, without a hearing, to support a judgment, entered, March 4, 1940 evidence. He took them as facts. (After Judgment).

We pursue the matter no further except to cite the fact of record, showing no jurisdiction:

> The notice to the parties and court is found in all of the pleadings that Langdon and Houston were necessary parties as early as February 14th, the court finding they did not appear "timely enough." The law is: if the right to a transfer of a chose of action after notice is made during the pendency of an action, after notice of transfer or claim of any rightful party, and any settlement is made between the litigant party and the adverse actual parties, a judgment of the court upon such an agreement is void. 501 to 511. (Ky. Code).
>
> *This was done here.* Rule 77.

(15) THE ATTORNEYS COULD NOT APPEAR IN THIS CASE, BECAUSE THE STATUTE LIMITING THE POWER OF THE ATTORNEY GENERAL, HAS NEVER BEEN REPEALED, AND THE EMERGENCY DID NOT EXIST FOR ANY CONTRACT WITH CLIFFORD SMITH. THE CONTRACT WAS NOT RECORDED AS THE LAW REQUIRES, AND NO CERTIFICATION WAS GIVEN

BY THE ATTORNEY GENERAL OR THE INTERNAL REVENUE DEPARTMENT, AND IN ANY EVENT SUCH CERTIFICATION CAN ONLY COME *ABOUT IN A SINGLE CASE.* SMITH HAS APPEARED IN AT LEAST ONE HUNDRED CASES IN THE LAST FOUR YEARS.

The Court of Appeals in Columbia Trust Co. 162 Ky. 827, held that the resignation of a public official ceased and determined the action in which he was a party, on the state's relation. Not only was this, plain of record, but notice was served on J. J. Leary and H. Clyde Reeves who had been injected into the case in some unknown manner not made public.

> The judgment shows that, "it is ordered and adjudged by and on relation of J. W. Martin the parties having agreed to a settlement." April 29, 1940.

We know, no such judgment had any such validity as claimed, and a Mandamus by the Circuit Court should have been issued because no appeal was made or could be made, but Petitioners, asked in a MOTION for findings to make such reasons clear for their refusal of a Mandamus, and the Court refused or made no response.

THE JUDGMENT OF MARCH 4th, 1940 was void; and the judgment of April 29th, also void, so the action stands on the docket Exparte, from and after July 1, 1939, and very certainly from and after the 29th day of August, 1938, owing to default.

SIXTH CIRCUIT COURT OF APPEALS

(16) In Asher vs. Ford Coal Co. 249 Ky. 699, the Court of Appeals of Kentucky settled every ques-

tion in this case so far as jurisdiction after July 1st, 1939, is concerned. The court in that case held that the action may continue if revived in the name of a party that has no interest in the outcome, provided the actual parties are the real movants. The same question was decided by the Court of Appeals prior and since that decision, and the decision in Fordson vs. Jackson 7th Fed. (2) 117, and Kentucky Code 508-510 were ample binding authority on the Circuit Court of Appeals for 6th Circuit.

In Whalen vs. Welsh 269 Fed. 689 the question was discussed and the court arrived at the opinion that substitution must be made within six months after the date of resignation.

Under Section 236 USC the judgment would be void.

THE MOTION FOR JUDGMENT.

(17) The motion for judgment pro-confesso, made on December 11th, would be the next order of the court on the return of the case.

Norfolk Ry. vs. Hazelrigg 170 Fed. 551 (Ky. case, 6th Circ.)

C. & O. vs. Thieman 96 Kentucky 507

Kentucky Code 90 ("if no defense pleaded")

Kentucky Code 386, Auto vs. Stone, 237 Ky. 686.

Evans vs. Stone 80 Kentucky 78

Milliken vs Milliken 23 S. W. 352.

(18) *The Franklin Circuit Court had no jurisdiction to issue a summons* which was not served by the party it was issued to, and a penal statute in

Kentucky must be enforced under the Jurisdiction of the court, in the county where the offense was committed; and no attorney or officer can segregate from the statute the money penalties and leave out the jail penalties, in order to avoid jurisdiction of the court where the offense, if any, was committed. If the tax was not paid, and the Morris Co. had defaulted in the sum of $10,000, the tax became due after finding of guilt in the trial of a state court in Boyd County, on a plea of "Not Guilty." The court of appeals having held that this is the proper proceedure under such a statute.

Com. vs. Grand Central Bldg. Loan Assoc. 97-325

Licking River Lumber Co. vs. Benlosky 6 Kentucky

DeWolf vs. Mallet's Admr. 33 Ky. 214

Ernst vs. Pike 232 Kentucky 680

Smith vs. Dungey 173 702.

Casey Milling Co. of Newport vs. 156 Ky. 623.

Morris Co. could not appear. Sec. 671 Ky. Stat.

We submit that all the questions here are not to be discussed, and we rely upon the fact that there is no escape from determining the issues here on an ex parte basis, and that the judgment of this court must be to J. W. Martin and Commonwealth of Kentucky, to return the 225 cases in the possession of the court, and the sixty cases seized without attachment order. *The question before this court being one of law*, on the agreed condition of the record,

rather than one of fact as shown by the record. The proceedure however ought to be determined by this court in its mandate, laid down to the Circuit Court of Appeals of the Sixth Circuit, with directions to the United States District Court, and for the trial of this cause by a judge outside of the district. Hence petition should be allowed.

Respectfully submitted,

HARVEY H. SMITH.

We concur in the law as presented, and the facts so far as shown by the files denied of record, and protest the manner of Judicial determination; and for the undisclosed claimants, for return of their money paid unlawfully in import taxes; that this petition should be granted and an impartial hearing be directed.

GEO. E. WHITMAN.